(6)

No. 95-1918

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

STATE OF ARKANSAS, PETITIONER

v.

FARM CREDIT SERVICES OF CENTRAL ARKANSAS, PCA; FARM CREDIT SERVICES OF WESTERN ARKANSAS, PCA; EASTERN ARKANSAS PRODUCTION CREDIT ASSOCIATION; and DELTAPRODUCTION CREDIT ASSOCIATION RESPONDENTS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED MAY 22, 1996
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UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF ARKANSAS WESTERN DIVISION

FARM CREDIT SERVICES OF CENTRAL ARKANSAS, PCA; FARM CREDIT SERVICES OF WESTERN ARKANSAS, PCA; EASTERN ARKANSAS PRODUCTION CREDIT ASSOCIATION; and DELTA PRODUCTION CREDIT ASSOCIATION

VS .

STATE OF ARKANSAS

COMPLAINT FOR DECLARATORY JUDGMENT

COME NOW, the Plaintiffs, Farm Credit Services of Central Arkansas, PCA, Farm Credit Services of Western Arkansas, PCA,Eastern Arkansas Production Credit Association, and Delta Production Credit Association, by and through their attorneys, Nichols, Wolff & Ledbetter, P.A., for their complaint against the State of Arkansas, state:

I

Plaintiffs, Farm Credit Services of Central Arkansas, PCA, Farm Credit Services of Western Arkansas, PCA, Eastern Arkansas Production Credit Associatlon, and Delta Production Credit Association, are production credit associations chartered by the Farm Credit Association in accordance with the Farm Credit Act of 1971. They are cooperative credit institutions whose only business is providing those services which are allowed by the Farm Credit Act. These services include primarily making short term and intermediate loans to (a) bona fide farmers and ranchers and farmers and producers or harvesters of aquatic products for agricultural or aquatic purposes and other

such borrowers as specified by the Act, (b) rural residents for housing financing in rural areas, and (c) persons furnishing to farmers and ranchers farm related services directly related to their on-farm operating needs. They may also provide technical assistance to borrowers, applicants and members and make available to them, at their option, such financial-related services appropriate to their on-farm and aquatic operations as is permissible under the applicable regulations.

II.

Defendant, the State of Arkansas, by and through the Department of Finance and Administration and the State Treasurer, administers and collects sales and use taxes and income taxes.

III.

This is an action for declaratory judgment pursuant to section 2201 of Title 28 of the United States Code, for the purpose of determining a question of actual controversy concerning the Supremacy Clause of the United States Constitution between the parties as hereinafter more fully appears.

IV.

Venue of this action lies in this court under section 1391(b) of Title 28 of the United States Code.

V.

Jurisdiction of this action is based on section 1331 of Title 28 of the United States Code and Article Six, Clause Two of the Constitution of the United States. The amount in controversy exceeds $10,000, exclusive of interest and costs.

VI.

Plaintiffs, production credit associations, as that term is defined in the Farm Credit Act of 1971 are deemed Federal Instrumentalities pursuant to section 2071(a) of Title 12 of the United States Code. This designation is bestowed by Congress upon production credit associations in recognition of their vital role in providing a readily available source of credit to the agricultural sector of the United States economy.

VII.

Plaintiffs (i) have filed income and sales tax reports and returns required by the Defendant, and (ii) have paid all sales and income tax required by Defendant to be paid for the calendar years 1991, 1992, 1993, and 1994.

VIII.

On May 5, 1994, Plaintiffs requested the Defendant to recognize their status as Federal Instrumentalities and to exempt them from income and sales taxes imposed by the State of Arkansas. Plaintiffs letter to the Department of Finance and Administration is attached hereto as Exhibit "A".

IX.

In response to Plaintiffs request, on May 26, 1994, the Defendant, by and through the Department of Finance and Administration, released Opinion No. 940511 denying Plaintiffs status as Federal Instrumentalities and refusing to acknowledge Plaintiffs' status as exempt entities. The May 26, 1994 Opinion letter is attached hereto as Exhibit "B".

X.

Plaintiffs, as Federal Instrumentalities, are exempt under section 2077 of Title 12 of the United States Code from state and local taxes pursuant to the Supremacy Clause of the United States Constitution, Article Six, Clause Two.

WHEREFORE, Plaintiffs pray that

1. The court (i) enter a declaratory judgment that Plaintiffs are exempt from state and local taxes, (ii) order the State of Arkansas to remove any existing assessments or liens of taxes against the Plaintiffs, and (iii) enjoin the Defendant from further imposing or assessing any taxes upon the Plaintiffs

2. The court grant such other relief as may be proper.

Respectfully Submitted,

Attorney for Plaintiffs
NICHOLS, WOLFF &
LEDBETTER,P.A.
200 W. Capitol, Suite 1650
Little Rock, AR 72201

by:
Mark W. Michols (77097)

(Letterhead omitted in printing)

May 5, 1994

Timothy Leathers, Commissioner of Revenues
Department of Finance and Administration
P.O. Box 1272 Little Rock, Arkansas 72203

Dear Mr. Leathers:

This firm represents Farm Credit Services of Central Arkansas, PCA ("FCS-CA"). FCS-CA is a production credit association chartered by the Farm Credit Administration In accordance with the Farm Credit Act. [illegible] ooperative credit institution. Its only business is providing those services which are allowed by the Farm Credit Act. These services include primarily making short and intermediate loans to (a) bona fide farmers and ranchers and ranchers and producers or harvesters of aquatic products for agricultural or aquatic purposes and other such borrowers as specified in the Act, (b) rural residents for housing financing in rural areas, and (c) persons furnishing to farmers and ranchers farm related services directly related to their on-farm operating needs. It may also provide technical assistance to borrowers, applicants and members and make available to them, at their option, such financially-related services appropriate to their on-farm and aquatic operations as is permissible under the applicable regulations. A copy of its charter is attached as Exhibit A.

FCS-CA is owned by its members. Presently, the capital structure of FCS-CA is found in the Article VIII of its bylaws, a copy of which is attached as Exhibit B.

As of April 1, 1994, FCS-CA had the following capital structure:

Capital	Shares
A Common Stock	12,113
B Common Stock	3
C Common Stock	178,397
Participation Certificates Series 1	0
Participation Certificates Series 2	0

Since 1991, FCS-CA has been paying state income and sales and use taxes also, it may have paid taxes under the name of a predecessor organization prior to that time. Copies of its state Income taxes for the years 1991 and 1992 are attached as Exhibits C and D. Additionally, it has been making payments of state sales taxes, a copy of a sample monthly excise tax report is attached as Exhibit E.

FCS-CA believes that all tax payments made by it or its predecessor organizations have been made in error, since a production credit association is a federal instrumentality. Additionally, under state law, FCS-CA is an exempt organization as that term is defined pursuant to A.C.A § 26-51-303.

FCS-CA is Except From State Taxation Due to its Status as a Federal Instrumentality

It has been long undisputed that the United States Constitution prohibits a state from taxing the federal government or any of its instrumentalities unless Congress specifically consents to such taxation. Article IV § 3 cl. 2 of the United States Constitution: *McCulloch v. Maryland,* 17 U.S. 316, 4 Wheat. 316, 4 L.Ed 579 (1918); *Federal Land Bank v. Bismark Lumber Co.,* 314 U.S.357, 63 S.Ct.587.87 L.Ed.. 834 (1941).

As the Court in *Board of Directors v. Reconstruction Finance Corp.,* 170 F.2d 430 (8th Cir. 1948) stated:

> It is familiar law that a State has no power to tax the property of the United States or any of its instrumentalities within its limits without the consent of Congress whether such tax be strictly for state purposes or for local and special objects." (Citations omitted.)

By statute, production credit associations are deemed to be instrumentalities of the United States. 12 U.S.C.S. § 2077 (Supp. 1993). This statute states:

> *Each production credit association and its obligations are instrumentalities of the United States* and as such any and all notes, debentures, and other obligations issued by such association shall be exempt, both as to principal and interest, from all taxation (except surtaxes, estate, inheritance, and gift taxes) now or hereafter imposed by the United States or any State, territorial, or local taxing authority, except that interest on such obligations shall be subject to Federal income taxation in the hands of the holder." (emphasis added).

This provision has been a part of the Farm Credit Act since the inception of the Act. The purpose of the Production Credit Association and the Farm Credit Act has long been recognized.

> "It is the federal government which created the production credit corporations for the purpose of carrying out a federal object.... Both farm loan associations and production credit associations were created by Congress for the same general purpose, that is, to afford credit to agricultural producers. If the farm loan association is a constitutional federal instrumentality, the production credit association is also, and not merely the farm loan banks, but also the farm loan associations, have been repeatedly held lawful instrumentalities of the federal government".

Southwest Washington Production Cr. Ass'n v. Fender, 150 P. 2d 983 (Wash. 1944).

Nowhere in the Farm Credit Act does Congress consent to a state taxing a production credit association's activities.. As a result of the policies set forth in the Farm Credit Act, numerous courts have held production credit associations to be instrumentalities of the federal government and as such exempt from state and local taxation and other matters. *M.G. West Co. v, Johnson,* 66 P. 2d 1211 (1937). (As an instrumentality, Production Credit Association exempt from state retail sale tax.) *Southwest Washington Production Cr. Ass'n v. Fender, supra..* (Production Credit Association is exempt from payment of state corporate license fees due to its status as federal instrumentality) *Matter of Sparkman,* 703 F.2d 1097, 1100 (9th Cir. 1983) (Production Credit Association is not liable for punitive damages because it was an instrumentality of the United States Government): *Smith v. Russellville Production Credit Assoc.,* 777 F. 2d 1544 (11th Cir. 1985) (Production Credit Association is federal instrumentality because it fulfills government mission of channelling credit to farmers).

In fact, the Eighth Circuit Court of Appeals has specifically held that a production credit association is a federal instrumentality In the *United States in Rohweder v. Aberdeen Production Credit Assoc.,* 765 F. 2d 109 (8th Cir. 1985) and is not subject to the imposition of punitive damages.

The statutory language denoting production credit associations as federal instrumentalities is similar to the provisions of other federal instrumentalities found in other statutes. 12 U.S.C.S. 2098 (Federal Land Bank Associations); 12 U.S.C.S. 2134 (Bank for Cooperatives); 12 U.S.C.S. 1433 (Federal Home Loan Bank Board); 12 U.S.C.S. 1768 (Federal Credit Unions). While the language of each of these other provisions is slightly different, the underlying congressional intention is clear. It allows these federally chartered institutions to be considered instrumentalities of the federal government. *Federal Reserve Bank v, Metro Center improvement District,* 657 F.2d 183 (8th Cir. 1981). In the *Federal Reserve Bank* case, supra, the Eighth Circuit found that the District Court erred in finding that the

Federal Reserve Bank was not an agency or instrumentality of the federal government for purposes of tax immunity. In the statutes creating the Federal Reserve Bank, Congress failed to specifically declare that the Federal Reserve Bank was a "instrumentality", the statute merely provide an exemption from taxation. 12 U.S.C.S. 531. However, the lack of the congressional declaration did not stop the Court from overturning the lower Court and holding that the Federal Reserve Bank was a federal instrumentality due to the important governmental functions performed by federal reserve banks.

The language of 12 U.S.C.S. 2077 is manifestly clear. Congress had declared production credit associations to be instrumentalities of the government and, as such, the status of FCS-CA is unassailable. Further, Congress has not consented to any taxation of its activities. Accordingly FCS-CA is exempt from all state taxation.

FCS-CA is Exempt From State Income Taxation Due to its Status as an Exempt Organization Under A C.A § 26-51-303

FCS-CA has an additional ground to exempt it from state income taxes. Under Ark. Code Ann. § 26-51-303 provides as follows:

> The following organization shall be exempt from taxation under this act: (8) Labor, agricultural or horticultural organizations, no part of the net earnings of which inures to the benefit of any private stockholder or member.

As set forth above, the capital structure of FCS-CA follows the requirements set forth In the Farm Credit Act. As of April 1, 1994, the capital structure of FCS-CA was composed of two (2) classes of common stock and two (2) series of participation certificates Both classes of common stock, as can be seen from the attached bylaws, are mere evidences of ownership. These evidences of ownership are required as a condition for the ex-

tension of credit. As a cooperative organization, FCS-CA requires that each borrower become a member of FCS-CA. In connection with a borrowing, a borrower is required to purchase stock in an amount equal to two percent (2%) of the loan value not to exceed $1,000. No dividends have been paid upon this stock. The stock merely provides a method of recognizing the voting interest of a member of the cooperative venture.

CONCLUSION

Under the statutory and case authorities, a production credit association is a federal instrumentality and as such is exempt from state taxation. It is also an exempt organization under Arkansas law and is exempt from state income taxation.

Once you have reviewed this letter, I would appreciate the opportunity of discussing the matter further with you or your staff. Obviously, should you have any questions or require any further information, I will be happy to respond to those inquiries.

Sincerely,

/s/ Mark W. Nichols

(Letterhead omitted in printing)

May 26, 1994

Mr. Mark Nichols
Nichols, Wolff & Ledbetter
1650 Worthen Bank Building
200 West Capitol Ave.
Little Rock, AR 72201

RE: Federal Instrumentality Status of Farm Credit Services of Central Arkansas, PCA (FCS-CA), Delta Production Credit Association (DPCA), Farm Credit Services of Western Arkansas, PCA (FCS-WA) and Eastern Arkansas Production Credit Association (EAPCA)

Opinion No. 940511

Dear Mark:

By your letters of May 5, 1994, you requested an opinion on whether the above-referenced production credit associations are exempt from corporate income and sales tax under either state or federal law. For the reasons discussed below, it is our opinion that a production credit association ("PCA") is not exempt under either federal or state law and that the PCA's listed above are required to report and pay sales tax, corporate income tax, and any other state tax which may apply to its activities within Arkansas.

State Law

Ark. Code Ann. §26-51-303 (8) provides an exemption from income tax for "labor, agricultural, or horticultural organizations, no part of the net earning of which inures to the benefit of any private stockholder or member." This exemption is identical to the Federal exemption of 26 U.S.C.. §§501(c) (5)). Although there are no state income tax regulations covering this

statute, federal regulations allow this exemption to organizations if: 1) the net earnings restrictions are met, and 2) if the objective of the organization is the betterment of the members' conditions, the improvement of the members' products and the improvement of the members' efficiency in their business pursuits. I.R.C. Reg. §1.501(c)(5)l(a)(1). When federal regulations cover a federal statute which is identical to a state statute, we view the federal regulation as an interpretive tool.

The PCA's are authorized to pay patronage refunds as well as dividends to holders of specified classes of stock including private investors.. Clearly the net earnings may inure to the benefit of a member or private stockholder. In addition, the main objectives of a PCA is to make short and intermediate term loans to farmers, ranchers, and other agricultural producers. These objectives do not meet the requirements of the federal regulations.

Federal Law

There are compelling reasons to treat the PCA's as private entities rather than federal instrumentalities:

1) A PCA is owned and operated by the shareholders, e.g. farmers, ranchers, etc.

2) A PCA acts as any other financial institution in making loans, selling stock to investors, and has the power to pay dividends.

3) PCA employees are not federal civil service employees.

4) PCA's are described in legislative history as government sponsored, rather than government owned or controlled (House Report No. 100-295).

5) Revisions to the Farm Credit Act of 1971 created a secondary market for farm mortgages as well as an insurance system similar to FDIC for backing institution securities and encouraging farm loan restructuring.

6) PCA loan rates are competitive with other financial institutions.

7) Federal statutes authorize PCA's to sue and be sued.

8) Loan funds may come from stock purchases, private banks, or other Farm Credit System Banks. Federal funding is available only if appropriated and is expected to be repaid on specified terms.

9) Prior to 1987, §2.17 of the Farm Credit Act of 1971 provided an exemption from tax for PCA income. This exemption was removed by 1987 amendments. 12 U.S.C. §2077.

Although the Eighth Circuit has stated in several cases that it considers PCA's to be federal instrumentalities none of the cases I have located so far are tax cases. Further, the Seventh Circuit recently held that neither a production credit association nor a federal land bank association was a federal instrumentality for reasons similar to those listed above. ***Hanna v. Federal Land Bank Ass'n***, 903 F.2d 1159 (7th Cir. 1990). In addition, the Fourth Circuit recently ruled relying upon Hanna that a federal home loan bank was not a federal instrumentality. ***Andrews v. Federal Home Loan Bank of Atlanta***, 998 F.2d 214 (4th cir.. 1993). Because doubt exists as to the entitlement of the PCA' s to an exemption from tax, the request for exemption is denied.

The PCA's have three choices concerning their outstanding corporate and sales tax returns:

1) They may file the returns and pay the tax without protest.

2) They may file the returns and pay the tax under protest. They must then file suit within one year in order to preserve any right to a refund. Ark. Code Ann. §26-18- 406.

3) They may choose not to file returns. If so, they may be assessed delinquent tax and may then request an administrative hearing.

This opinion is based on my understanding of the facts as set out in your inquiry as those facts are governed by current Arkansas laws, rules and regulations. Any change in the facts or law could result in a different opinion.

Yours truly,

/s/ Beth B. Carson
Revenue Legal Counsel

UNITED STATED DISTRICT COURT
FOR THE EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

(Title omitted in printing)

DEFENDANT'S MOTION TO DISMISS COMPLAINT

Comes now Tim Leathers, Commissioner of Revenue, Division of Revenue in the Arkansas Department of Finance and Administration, and makes this, his Motion to Dismiss Plaintiff's Complaint, as follows:

1. The Court has no subject matter jurisdiction over the matters stated in the complaint and should dismiss this suit pursuant to Fed. R. Civ. P. 12(b)(1).

2. Plaintiffs have failed to state any claim upon which relief can be granted and their complaint should be dismissed pursuant to Fed. R. Civ. P. 12(b)(6).

3. Plaintiffs' suit is barred by the Tax Injunction Act (28 U.S.C. §1341) and should be dismissed.

WHEREFORE, premises considered, Defendant prays that Plaintiffs' complaint be dismissed.

Respectfully submitted,

/s/ Beth B. Carson

(Certificate of Service omitted in printing)

UNITED STATED DISTRICT COURT FOR THE EASTERN DISTRICT OF ARKANSAS WESTERN DIVISION

BRIEF IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS COMPLAINT

Comes now Tim Leathers, Commissioner of Revenue, Division of Revenue in the Arkansas Department of Finance and Administration, and presents this, his Brief in Support of Motion to Dismiss Plaintiff's Complaint, as follows:

Facts

1. Plaintiffs are production credit associations, collectively referenced as PCA's, doing business in Arkansas. They voluntarily filed Arkansas corporate income tax returns as well as sales and use tax returns for at least 1991 - 1993. Taxes for periods in 1994 are being paid under protest, although no assessments have been made. By letters dated May 5, 1994, the PCA's filed claims for refund for taxes paid in 1991, 1992 and 1993 pursuant to Ark. Code Ann. §26-18-507. Those claims were denied on May 31, 1994.

2. Also by letter dated May 5, 1994, Plaintiffs requested that the Department of Finance and Administration issue an opinion concerning the tax status of the PCA's. The Department's opinion that PCA's are not exempt from state tax is attached to Plaintiffs' Complaint.

3. Plaintiffs' Complaint requests the following relief:

a. a declaratory judgment that PCA's are exempt from state and local taxes "as Federal Instrumentalities" and "pursuant to the Supremacy Clause;"

b. an injunction to stop the Department from "further imposing or assessing any taxes upon the Plaintiffs;" and,

c. an order requiring the State to "remove any existing assessments or liens of taxes against the Plaintiffs."

SUBJECT MATTER JURISDICTION — DECLARATORY JUDGMENT

4. Declaratory judgment is a form of relief and the Federal Declaratory Judgment Act, 28 U.S.C. §2201, does not confer subject matter jurisdiction. There must be a federal right of entry to federal courts. Plaintiffs allege that this court has jurisdiction under 28 U.S.C. §1331 (federal question). The complaint must show on its face that Plaintiffs' suit arises under the Constitution, laws, or treaties of the United States; however, no substantial federal question is stated in this matter.

5. Plaintiffs seek a declaration that they are not subject to Arkansas income, sales and use tax because they are federal instrumentalities exempt from tax under the Supremacy Clause of the U.S. Constitution. Plaintiffs have alleged no action by the State against them which would give rise to a federal cause of action. What Plaintiffs have really alleged is a possible defense to a state tax assessment, although no assessment has been made. The only possible claims Plaintiffs have against the State of Arkansas are their claims for refund which they may pursue in state court. See Ark. Code Ann. §§26-18-507 and 26-18-406.

6. As the Eighth Circuit stated:

> Thus, when a party seeks access to federal court in a declaratory judgment action, the court must examine the realistic position of the parties. The court may realign the parties, if necessary, to determine whether the declaratory plaintiff affirmatively asserts a federal claim, or seeks in effect, to establish a defense against a cause of action which the declaratory defendant might assert in state court. *Lawrence County S.D. v. State of South Dakota,* 668 F.2d 27, 30 (8th Cir. 1982). See also *Public Service Commission v. Wycoff,* 344 U.S. 237 (1952)

7. The South Dakota case is very similar to case before this court. There, the county filed an action for declaratory judgment against the state seeking a declaration that a federal stat-

ute affecting school funding preempted a state funding statute under the Supremacy Clause. Although the District Court did not consider subject matter jurisdiction, the Eighth Circuit compared the matter to *Wycoff* and, on its own, dismissed the complaint, stating:

> In effect, the county's complaint asserts a defense against a potential claim to the funds by the school districts and special districts. A realistic alignment of the parties would cast the declaratory defendants as claimants of a portion of the funds to which state law entitles them. The school district's claim would be based solely upon violation of the state statute. Lawrence County could then raise its supremacy clause claim defensively. This defensive assertion of the preemption doctrine, however, cannot convert the action into one arising under federal law within the meaning of 28 U.S.C. §1331. 668 F.2d at 31.

8. Other Eighth Circuit cases which support dismissal for lack of jurisdiction include *Home Federal Savings and Loan Assn. v. Insurance Department of Iowa*, 571 F.2d 423 (8th Cir. 1978); *First National Bank of Aberdeen v. Aberdeen National Bank*, 627 F.2d 843 (8th Cir. 1980); and *First Federal Savings and Loan Assn. v. Anderson*, 681 F.2d 528 (8th Cir. 1982).

9. *Exxon Corp. v. Hunt*, 683 F.2d 69 (3rd Cir. 1982), although not an Eighth Circuit case, does involve a state tax. There, Exxon and others sought a declaratory judgment in District Court that the federal Superfund Act exempted it from New Jersey tax levied on oil for a spill cleanup fund based on preemption. The Third Circuit dismissed the complaint for lack of jurisdiction because no claim arising under federal law was presented. The court stated:

> In summary, a declaratory judgment complaint does not state a cause of action under federal law when the federal issue is in the nature of a defense to a state law claim. Yet that is precisely the situation in what is in fact a federal defense to a purely state law enforcement action. *Skelly* and *Wycoff* teach us that under these circumstances federal question jurisdiction is lacking. 683 F.2d at 73.

SUBJECT MATTER JURISDICTION - INJUNCTION

10. Based on the Plaintiffs' Complaint, this court has no equity jurisdiction for purposes of injunctive relief. As stated in *Louis W. Epstein Family Partnership v. Kmart Corp.*, 828 F. Supp. 328 (E.D. Pa. 1933) citing *Younger v. Harris*, 401 U.S. 37 (1971), equity jurisdiction is proper "if the plaintiff has no adequate remedy at law, the threatened injury is real as opposed to imagined, and no of jurisdiction."

11. There is no adequate remedy at law if the injury is of a repeated or continuing character or where monetary damages are difficult to ascertain or are inadequate. 828 F. Supp. at 337. The only "wrong" alleged by Plaintiff is the State's opinion that PCA's are not exempt from state taxes. No assessment has been alleged to have been made by the State so that there is no threatened injury to Plaintiffs and no acts to enjoin. As stated previously, any argument that PCA's are exempt entities may be raised in a state tax refund suit. If PCA's are ultimately determined to be exempt in the state refund action, then the PCA's are entitled to tax refunds with 10% statutory interest. Clearly, the PCA's have an adequate remedy under state law and this court is without jurisdiction to issue an injunction against the State of Arkansas.

FAILURE TO STATE CLAIM

12. Accepting the facts alleged in Plaintiffs' Complaint as true, there is no set of facts which forms a basis for the relief requested. As stated above, there is no claim stated against the State of Arkansas to enforce or redress a federal right. Plaintiffs are merely dissatisfied with the opinion of the Department

of Finance and Administration that they are not exempt from state tax. Plaintiffs have not stated a justifiable issue for purposes of declaratory relief.

13. With respect to Plaintiffs' request for an injunction against future tax assessments, Plaintiffs have not affirmatively alleged:

a) that the State has actually assessed any tax against Plaintiffs or threatened to assess tax against Plaintiffs;

b) that Plaintiffs have no adequate remedy at law;

c) that failure to enjoin future action by the State of Arkansas will result in irreparable harm. In sum, there are no facts stated supporting a basis for this court to issue an injunction against the State of Arkansas.

SUIT BARRED BY TAX INJUNCTION ACT

14. The Tax Injunction Act (28 U.S.C. §1341) prohibits a District Court from issuing an injunction affecting a state tax "where a plain, speedy and efficient remedy may be had in the courts of such State." The Act also prohibits a District Court from issuing a declaratory judgment. *California v. Grace Brethren Church*, 457 U.S. 393 (1092).

15. There should be no dispute that Arkansas law provides a "plain, speedy, and efficient" remedy through either a refund procedure under Ark. Code Ann. §26-18-507 or a protest payment and suit for refund under Ark Code Ann. §26-18-406. See *California v. Grace Brethren Church*, 457 U.S. 393. Because the Tax Injunction Act applies in this case, this court has no jurisdiction over this matter because " the Tax Injunction Act embodied Congress' decision to transfer jurisdiction over a class of substantial federal claims from the federal district courts to the state courts..." *Rosewell v. LaSalle National Bank*, 450 U.S. 503, 515 n.19 (1981). In *Exxon Corp. v. Hunt*, discussed above, the Third Circuit also dismissed the case as the Tax Injunction Act imposed a jurisdictional bar. WHEREFORE, premises considered, Defendant prays that

Injunction Act embodied Congress' decision to transfer jurisdiction over a class of substantial federal claims from the federal district courts to the state courts..." *Rosewell v. LaSalle National Bank*, 450 U.S. 503, 515 n.19 (1981). In *Exxon Corp. v. Hunt*, discussed above, the Third Circuit also dismissed the case as the Tax Injunction Act imposed a jurisdictional bar. WHEREFORE, premises considered, Defendant prays that Plaintiffs' complaint be dismissed.

Respectfully submitted,
/s/ Beth B. Carson

(Certificate of Service omitted in printing)

FOR THE EASTERN DISTRICT OF ARKANSAS WESTERN DIVISION

(Title omitted in printing)

PLAINTIFF'S RESPONSE TO DEFENDANT 'S MOTION TO DISMISS

Come now, Farm Credit Services of Central Arkansas, PCA; Farm Credit Services of Western Arkansas, PCA; Eastern Arkansas Production Credit Association and Delta Production Credit Association, and present this, their Response to Defendant's Motion to Dismiss Plaintiffs' Complaint, and state:

Defendant asserts three arguments for dismissal for Plaintiffs' Complaint:

(1) lack of subject matter jurisdiction;

(2) failure to state a claim; and,

(3) that the Tax Injunction Act, 28 U.S.C. § 1341, bars this court from hearing Plaintiffs' cause.

I. THIS COURT HAS SUBJECT MATTER JURISDICTION

Defendant attacks the court's subject matter jurisdiction on two grounds, both of which lack merit. First, Defendant argues that the Plaintiffs' have not raised a substantial federal question, and that this court lacks jurisdiction because there is no action by the state against Plaintiffs which supports their cause of action.

Defendant's motion to dismiss states that Plaintiffs have alleged "a possible defense to a state tax assessment" and asserts that such an allegation is insufficient grounds for jurisdiction because it is an assertion of an anticipated defense. This is not

a correct statement of the law and Defendant's reliance on *Lawrence County. S.D. v. South Dakota*, 668 F.2d 27 (8th Cir. 1982) for this argument is clearly improper. The Supreme Court in *Lawrence County v. Lead-Deadwood Sch. Dist.*, 469 U.S. 256 (1985) summarily dealt with the Eighth Circuit's conclusion in *Lawrence County, S.D. v. South Dakota* that the plaintiff's invocation of the Supremacy Clause did not convert the action into one arising under federal law for purposes of federal jurisdiction under 28 U.S.C. § 133 by stating, "This ruling was erroneous." 469 U.S. at 259 n.6.

In accordance with the Supreme Court's ruling, in 1990, the Eighth Circuit recognized that in previous decisions it had improperly "rejected federal jurisdiction because the preemption claim was in the nature of a defense to a state action." *First Nat. Bank of E. Ark. v. Taylor*, 907 F.2d 775, 776-77 n.3 (8th Cir. 1990) (specifically referring to the rulings in *Lawrence County. S.D. v. South Dakota* and *Home Fed. Savs. & Loan Ass'n v . Insurance Dep't of Iowa*, 571 F.2d 423 (8th Cir. 1978), both of which Defendant cites in support of its argument). In fact, all the cases that the Defendant cites in support of its argument predate the Supreme Court's *Lawrence County* and the Eight Circuit's *First National Bank* opinions which clearly hold that subject matter jurisdiction exists where an affirmative claim of preemption presents a federal question.

The court in *First National Bank* acknowledged that "the Supreme Court has since made clear that a party may apply directly to federal court for relief based on an affirmative claim of preemption. " First Nat. Bank, 907 F.2d at 776-77 n.3 (citing Lawrence County v. Lead-Deadwood Sch. Dist., 459 U.S. 256 (1985) and *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85 (1983)).

The Supreme Court in *Shaw* reaffirmed the general rule as follows:

> A plaintiff who seeks injunctive relief from state regulation, on the ground that such regulation is pre-empted by a federal statute which, by virtue of the

Supremacy Clause of the Constitution, must prevail, thus presents a federal question which the federal courts have jurisdiction under 28 U.S.C. § 1331 to resolve. 463 U.S. at 96 n.14.

Following the correct rule of law announced by the Supreme Court and as later recognized by the Eighth Circuit, this court does have subject matter jurisdiction to hear Plaintiffs' cause of action. Plaintiffs are seeking a declaration of the rights of the parties involved in this controversy based on federal laws and the federal constitution. The Plaintiffs' Complaint states an affirmative claim of preemption: that the action of the state in denying Plaintiffs tax exempt status as federal instrumentalities is preempted by federal laws, 12 U.S.C. § 2071(a), which provides that production credit associations are federal instrumentalities, and 12 U.S.C. § 2077, which provides that federal instrumentalities are tax exempt, and that by virtue of the Supremacy Clause, the federal statutes must prevail. This clearly presents a federal question which this court has jurisdiction to resolve under 28 U.S.C. § 1331.

Second, Defendant attacks this court's subject matter jurisdiction on the basis that the requirements for pleading injunctive relief are not met in Plaintiffs' Complaint. Here, Defendant misinterprets Plaintiffs' request for relief. Plaintiffs are asking that this court declare that they are federal instrumentalities, and as such, that they are exempt from taxation by the State of Arkansas. Once this declaration is made, a court order enjoining the Defendant from future taxation of the Plaintiffs is a necessary consequence of the relief requested. Without such injunction, Plaintiffs would be forced to file another lawsuit when the Defendant attempts future collection or assessment of taxes from the Plaintiffs. It is reasonable for Plaintiffs to expect that Defendant will continue to expect payment of taxes from Plaintiffs because of Defendant's action denying tax exempt status on the basis that it did not consider Plaintiffs to be federal instrumentalities.

II. PLAINTIFFS HAVE STATED A CLAIM UPON WHICH RELIEF CAN BE GRANTED

Defendant argues that Plaintiffs have not stated a justiciable issue for purposes of declaratory relief. In order for there to be a justiciable controversy, the claim must not be "hypothetical or abstract" and "the controversy must be definite and concrete, touching the legal relations of the parties having adverse legal interests." *Aetna Life Ins. Co. v. Haworth* 300 U.S. 227, 240-41 (1937).

The Plaintiffs' cause of action involves a definite controversy concerning action by the state that is violative of federal laws and the Supremacy Clause, the parties possess adverse legal interests, and the issues are not hypothetical or abstract, they are real and concrete.

Defendant argues that there is no set of facts from which the Plaintiffs can base their cause of action; that the state's opinion letter denying Plaintiffs' tax exempt status is insufficient grounds upon which to state a claim. Again, Defendant misunderstands the law. Courts clearly possess the power to grant declaratory relief on the basis of an affirmative allegation of preemption. *Ex Parte Young*, 209 U.S. 123, 163-67 (1908). See also *First Nat. Bank of E. Ark. v. Taylor*, 907 F.2d 775 (8th Cir. 1990) (Arkansas Insurance Department requested the bank cease particular conduct, the bank complied and then brought suit in federal court seeking a declaration that the Department's action was preempted by federal law) and *Potlatch Forests, Inc. v. Hayes.*, 318 F.Supp 1368 (E.D. Ark. 1970) (a "controversy" existed and plaintiff was entitled to have the issue resolved despite the fact that plaintiff had not violated the allegedly invalid Arkansas statute and that he could avoid sanctions by continuing to obey it).

The fact that there is no presently existing assessment against the Plaintiffs does not render invalid their claim for declaratory relief. Defendant has made it clear that it expects Plaintiffs to pay taxes because it does not consider them to be federal in-

strumentalities. This is in direct conflict with federal law, and thus, a federal question is presented. Following the clear rule of law discussed above, Plaintiffs have stated a justiciable issue.

III. THIS SUIT IS NOT BARRED BY THE TAX INJUNCTION ACT

Defendant states in its Motion to Dismiss Plaintiffs' Complaint that this court is prohibited from issuing an injunction affecting a state tax under 28 U.S.C. § 1341. While this is a correct statement of the federal statute, there is a well recognized exception for suits on behalf of federal instrumentalities.

In *Department of Employment v. United States*, 385 U.S. 355, 358 (1966), the Supreme Court stated that the Tax Injunction Act "does not act as a restriction upon suits by the United States to protect itself and its instrumentalities from unconstitutional state exaction." This exception has been extended to allow a federal instrumentality to sue for an injunction without joining the United States as co-party. The Eight Circuit case of *Federal Reserve Rank of St. Louis v. Metrocentre Improvement Dist. . #1 , Little Rock*, 657 F.2d 183 (8th Cir. 1981) implicitly adopted this extension where, on its own, a federal instrumentality brought suit for declaratory and injunctive relief against a state entity.

See also *Federal Deposit Ins. Corp. v. New Iberia*, 921 F.2d 610 (5th Cir. 1991); *Federal Reserve Rank of Boston v Comm'r of Corps. & Taxation*, 499 F.2d 60 (1974); *Federal - Land of Wichita v. Bd. of County Comm'rs'* , 582 F .Supp 1507 (D.C. Colo. 1984); *National Carriers' Conference Comm'n v. Heffernan*, 440 F .Supp 1280 (D.C. Conn. 1977).

CONCLUSION

Based on the foregoing reasons, the Defendant's Motion to Dismiss Plaintiffs' Complaint should be denied. The Defendant has failed to acquaint itself with changes in the law, which unambiguously show that Plaintiffs, as federal instrumentalities, clearly have a right seek protection in the federal courts based upon the fact that the Defendant's action is in direct conflict with federal laws, and therefore, in violation of the Supremacy Clause of the United States Constitution.

Respectfully Submitted,

Attorney for Plaintiffs

NICHOLS, WOLFF &
LEDBETTER
200 W. Capitol, Suite 1650
Little Rock, AR 72201
(501) 372-5659

by:
Rufus E. Wolff (#85175)
Mark W. Nichols (#77097)

(Certificate of Service omitted in printing)

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

(Title omitted in printing)

PLAINTIFFS' MOTION FOR SUMMARY JUDGEMENT

COME NOW, the Plaintiffs, Farm Credit Services of Central Arkansas, PCA, Farm Credit Services of Western Arkansas, PCA, Eastern Arkansas Credit Production Association, and Delta Production Credit Association, by and through their attorneys, Nichols, Wolff, Ledbetter & Campbell, and respectfully move this Court to enter an Order granting Plaintiffs summary judgment against Defendant pursuant to Rule 56 of the Federal Rules of Civil Procedure, and for cause state the following:

1. Plaintiffs, Farm Credit Services of Central Arkansas, PCA, Farm Credit Services of Western Arkansas, PCA, Eastern Arkansas Credit Production Association, and Delta Production Credit Association, are Production Credit Associations chartered by the Farm Credit Association in accordance with the Farm Credit Act of 1971.

2. Plaintiffs, as Production Credit Associations, are federal instrumentalities pursuant to 12 U.S.C. § 2071(a).

3. Federal instrumentalities are exempt from state and local taxes pursuant to 12 U.S.C. § 2077 and Article VI, Clause 2 of the United States Constitution, (the "Supremacy Clause").

4. On June 17, 1994, Plaintiffs filed this suit seeking a declaration that Plaintiffs, as federal instrumentalities, are exempt from state and local income and sales taxation.

5. Defendant, the State of Arkansas, imposed and collected income and sales taxes from Plaintiffs for the calendar years 1991, 1992, 1993, and 1994, and has refused to recognize Plaintiffs' tax exempt status as federal instrumentalities and has correspondingly denied refund of any taxes.

6. Defendant's imposition and collection of income and sales taxes from Plaintiffs, its denial of refund of such taxes and its refusal to recognize Plaintiffs' tax exempt status as federal instrumentalities contravenes federal law and the Supremacy Clause of the United States Constitution.

7. A statement of material facts in which Plaintiffs contend there is no genuine issue to be tried is attached hereto.

WHEREFORE, Plaintiffs pray that an Order be entered granting summary judgment as a matter of law that Plaintiffs are federal instrumentalities exempt from state and local taxation pursuant to Article VI, Clause 2 of the Supremacy Clause of the Federal Constitution and 12 U.S.C. § 2077, and for attorneys fees, costs, and any other equitable relief toward which Plaintiffs may be entitled.

Respectfully Submitted,

Attorneys for Plaintiffs
NICHOLS, WOLFF, LEDBETTER
& CAMPBELL

(Certificate of Service omitted in printing)

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF ARKANSAS WESTERN DIVISION

(Title omitted in printing)

PLAINTIFFS' BRIEF IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT

INTRODUCTION

Plaintiffs, Farm Credit Services of Central Arkansas, PCA, Farm Credit Services of Western Arkansas, PCA, Eastern Arkansas - Credit Production Association, and Delta Production Credit Association, request this Court to rule as a matter of law that Plaintiffs are federal instrumentalities exempt from state income and sales taxes imposed by the Defendant.

"Summary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed to secure the just, speedy and inexpensive determination of every action." *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986).

PARTIES

Plaintiffs, Farm Credit Services of Central Arkansas, PCA, Farm Credit Services of Western Arkansas, PCA, Eastern Arkansas Credit Production Association, and Delta Production Credit Association, are production credit associations chartered by the Farm Credit Association in accordance with the Farm Credit Act of 1971. They are cooperative credit institutions whose only business is providing those services which are allowed by the Farm Credit Act.

Defendant, the State of Arkansas, by and through the Department of Finance and Administration and the State Treasurer, administers and collects sales and income taxes.

STATEMENT OF FACTS

Plaintiffs have filed sales tax reports and income tax returns required by the Defendant and have paid all gross receipts and income tax required to be paid for the calendar years 1991, 1992, 1993 and 1994.

On May 5, 1994, Plaintiffs requested the Defendant refund all taxes paid to Defendant in recognition of Plaintiffs' status as federal instrumentalities and exempt them from income and sales taxes imposed by the State of Arkansas. Plaintiffs' letters to the Department of Finance and Administration are attached to the Complaint.

In response, the Defendant, on May 26, 1994, denied Plaintiffs' request for refund and released Opinion No. 940511 denying Plaintiffs' status as federal instrumentalities. The denial of refund letter and the Opinion letter are likewise attached to the Complaint.

Plaintiffs subsequently paid under protest their 1994 gross receipts, 1993 income taxes, and 1994 estimated tax payments required by Defendant On June 17, 1994, Plaintiffs filed this suit seeking a declaration that Plaintiffs are federal instrumentalities exempt from state and local taxation. Plaintiffs request this Court to grant summary judgment because there is no genuine issue of material fact and, therefore, Plaintiffs are entitled to judgment as a matter of law.

LEGAL STANDARD

Summary judgment is proper where the moving party demonstrates that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. *Celotex Corp.*, 477 U.S. at 322. *See also* Fed. R. Civ. P. 56(c). When a motion for summary judgment is made and supported as provided in Rule 56, an adverse party may not rest upon the mere allegations or denials of their pleading, but their response, by affidavits or as otherwise provided in Rule 56, must set forth

specific facts showing that there is a genuine issue for trial. Id. at 324. *See also* Fed. R. Civ. P. 56(e).

LEGAL ARGUMENT

I. PLAINTIFFS ARE FEDERAL INSTRUMENTALITIES OF TRE UNITED STATES

Plaintiffs, as production credit associations, are deemed federal instrumentalities pursuant to the plain language of the following federal statutes:

12 U.S.C. § 2071(a): Each production credit association shall continue as a Federally chartered instrumentality of the United States.

This designation is bestowed by Congress upon production credit associations in recognition of their vital role in providing a readily available source of short and intermediate credit to the agricultural sector of the United States economy. See 12 U.S.C. § 2001.

The Farm Credit System involves three chains of agricultural lending:

(i) long-term farm real estate loans;
(ii) short and intermediate-term production loans; and
(iii) loans to agricultural cooperatives.

The long-term lending activity began in 1916 through various Federal Land Bank Associations ((FLBAs)), which serviced loans.

Short and intermediate production credit began with the formation in 1922 of twelve Federal Intermediate Credit Banks (FICBs). Because the FICB's were not close to the borrowers, Production Credit Associations (PCAs) were established in 1933 to mirror the FLBAs in servicing loans. Also in 1933, twelve district Banks for Cooperatives (BCs), and a National Bank for

Cooperatives, were formed to make loans to agricultural cooperatives.

Through the years, FLBA's and PCA's provided the primary link of credit to the agricultural community. FLBA's made long-term credit available to farmers to purchase land. Production Credit Associations made shorter term credit available for equipment, feed and other productions needs of the agricultural community. Both FLBA's and PCA's are chartered for specific geographic areas and restricted to lending for their respective agricultural lines under the present Farm Credit System. 12 U.S.C. § 2001, et seq.

The status of these Farm Credit System entities as integral parts of the federal government has been consistently upheld by the Supreme Court.

> The federal land banks are constitutionally created .... Through the land banks the federal government makes possible the extension of credit on liberal terms to farm borrowers. . . . They are "instrumentalities of the federal government, engaged in the performance of an important governmental function." *Federal Land Bank of St. Paul v. Bismark Lumber Co.*, 314 U.S. 95, 102 (1941) (quoting Federal Land Bank of St. Louis v. Priddy, 295U.S. 229, 231 (1935)).
>
> The national farm loan associations, the local cooperative organizations of borrowers through which the land banks make loans to individuals, are also federal instrumentalities. *Id.*

In concurring with the Supreme Court's recognition of Farm Credit System entities as federal instrumentalities, the Eighth Circuit has specifically held that production credit associations are federal instrumentalities. *Rohweder v. Aberdeen Prod. Credit Ass'n*, 765 F.2d 109, 113 (8th Cir. 1985). Other courts have

also reached this conclusion. See *Matter of Sparkman*, 703 F.2d 1097, 1100-01 (9th Cir. 1983); *Agrivest Partnership v. Central Iowa Prod. Credit Ass'n*, 373 N.W.2d 479, 482 (Iowa 1985); *Southwest Wash. Prod. Credit Ass'n v. Fender*, 150 P.2d 983, 987 (Wash. 1944).

The weight of authority as represented in federal statutes, Supreme Court holdings, the Eighth Circuit and other jurisdictions clearly supports the conclusion that Plaintiffs, as production credit associations organized under and chartered by federal laws, are instrumentalities of the United States.

II. PLAINTIFFS ARE IMMUNE FROM THE TAXES IMPOSED BY TEE STATE OF ARKANSAS

Federal law expressly exempts from taxation the obligations of production credit associations. 12 U.S.C. § 2077 provides:

> Each production credit association and its obligations are instrumentalities of the United States and as such any and all notes, debentures, and other obligations issued by such associations shall be exempt . . . from taxation (except surtaxes, estate, inheritance, and gift taxes) now or hereafter imposed by the United States or any State, territorial, or local taxing authority.

Thus, the obligations of Plaintiffs as production credit associations are exempt from state taxation. While complete immunity from taxation is not expressly provided by statute, it is nevertheless conferred under the Supremacy Clause of the Federal Constitution.

> This Constitution, and the laws of the United States which shall be made in pursuance thereof . . . shall be the supreme law of the land. U.S. Const.,., Art. VI, Cl. 2.

In *McCulloch v. Maryland*, 17 U.S. 316 (1819), the Supreme Court held that states were prohibited from taxing a federally chartered bank even though Congress had not specifically provided an exemption from the tax which the state sought to impose. In 1968 the Supreme Court summarized this long-standing doctrine of implied Constitutional immunity for the federal government and its instrumentalities:

> As long ago as 1819 . . . this Court declared unconstitutional a state tax on the bank of the United States since, according to Chief Justice Marshall, this amounted to a "tax on the operation of an instrument employed by the government of the Union to carry its powers into execution."
>
> A long line of subsequent decisions by this Court has firmly established the proposition that the States are without power, unless authorized by Congress, to tax federally created . . . banks. *First Agric. Nat'l Bank* of Berkshire County v. State Tax Comm'n, 392 U.S. 339, 340 (1968) (emphasis added).

Thus, Constitutional immunity of federal instrumentalities from state and local taxation is provided by the Supremacy Clause, and Congressional action is not necessary to invoke immunity, but rather is necessary to restrict, diminish or yield it.

To override the Constitutional immunity to state and local taxation of a federal instrumentality, Congress must take affirmative and express legislative action. Congress has not expressly consented to such taxation of production credit associations (12 U.S.C. § 2077 waives this immunity with regard to surtaxes, estate, inheritance, and gift taxes only). The Eighth Circuit has properly followed this rule as set forth by the Supreme Court.

Congress must express a clear, express, and affirmative desire to waive the immunity from taxation enjoyed by a federal instrumentality. *Federal Reserve Bank of St. Louis v. Metrocentre Improvement Dist. #1*, 657 F.2d 183, 186 (8th Cir. 1981), *aff'd*, 455 U.S. 995 (1982).

Due to the doctrine of implied constitutional immunity, Congressional consent to the taxation of a federal instrumentality must be clear, express and affirmative. *United States v. City of Adair,* 539 F.2d 1185, 1189 (8th Cir. 1976), cert. denied, 429 U.S. 1121 (1977).

Without Congressional-consent, a state lacks the power to tax a federal instrumentality. *Board of Directors of Red River Levee Dist. No. 1 v. Reconstruction Fin. Corp.*, 170 F.2d 430, 431-32 (8th Cir. 1948).

Furthermore, implied revocation of immunity of constitutional immunity cannot be argued:

> There is little scope for the application of that doctrine [silence by implication] to the tax immunity of governmental instrumentalities. The constitutional immunity of either government from taxation by the other, where Congress is silent, has its source in an implied restriction upon the powers of the taxing government. *Graves v. New York ex ref. O'Keefe*, 306 U.S. 466, 479-80 (1939) (emphasis added).

CONCLUSION

Based on the foregoing, Defendant lacks the authority to constitutionally tax Plaintiffs. Its denial of refund and corresponding refusal to recognize Plaintiffs as federal instrumentalities exempt from taxation violates the Supremacy Clause of the United States Constitution. Plaintiffs request this Court to grant summary judgment and rule as a matter of law that Plaintiffs are federal instrumentalities immune from state or local taxation imposed by the State of Arkansas.

Respectfully Submitted,
Attorneys for Plaintiffs

NICHOLS, WOLFF, LEDBETTER
& CAMPBELL, P.A.

By: Rufus E. Wolff
Mark W. Nichols

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

(Title omitted in printing)

RULE 29 STATEMENT OF FACTS

In support of their motion for Summary Judgment, Plaintiffs submit the following statement of facts:

1. Plaintiffs are production credit associations chartered by the Farm Credit Association in accordance with the Farm Credit Act of 1971. Attached as Exhibits A1 - A4 are the respective charters of each individual Plaintiff and the applicable portions of their bylaws reflecting their incorporation under the Farm Credit Act of 1971.

2. Plaintiffs filed sales tax reports and income tax returns required by the Defendant and have paid all sales and income tax required by Defendant to be paid for the calendar years 1991, 1992 1993, and 1994.

3. On May 5, 1994, Plaintiffs requested Defendant recognize their status as federal instrumentalities pursuant to 12 U.S.C. § 2071(a); exempt them from income and sales taxes imposed by the Defendant pursuant to 12 U.S.C. § 2077 and the Supremacy Clause of the United States Constitution and refund all taxes paid.

4. On May 26, 1994, Defendant formally denied Plaintiffs' request for refund and released Opinion No. 940511 which denied Plaintiffs status as federal instrumentalities in contravention to 12 U.S.C. § 2071(a) and refused to acknowledge Plaintiffs' tax exempt status in contravention of 12 U.S.C. § 2077 and the Supremacy Clause of the United States Constitution.

Respectfully Submitted,

Attorneys for Plaintiffs
NICHOLS, WOLFF, LEDBETTER
& CAMPBELL

(Certificate of Service omitted in printing)

FARM CREDIT SERVICES OF CENTRAL ARKANSAS, PCA
Monroe County, Arkansas

The Farm Credit Administration, in accordance with the Farm Credit Act of 1971, as amended (the Act), hereby charters a production credit association to be known as the Farm Credit Services of Central Arkansas, PCA (the Association). The principal office location of the Association shalt be in the City of Brinkley, County of Monroe, State of Arkansas. The Association is a Farm Credit institution and a federally chartered instrumentality.

By this Federal charter, the Farm Credit Administration hereby authorizes said Association to exercise all powers conferred on the Association under the Act and the regulations of the Farm Credit Administration within the following territory:

> In the State of Arkansas, the Counties of Arkansas, Bradley, Cleburne, Cleveland Fulton,, Independence, Izard, Jackson, Jefferson, Lawrence, Lonoke, Monroe, Prairie Pulaski, Randolph, Sharp, Stone, White, Woodruff, and all of Lincoln County except that part specified as the Townships of Mill Cre..., Lone Pine, Township 10, South, Range 6, West, and Township 10, South, Range 5, west of Smith Township.

IN WITNESS WHEREOF, the Chairman of the Farm Credit Administration Board has executed this charter and caused the seal of the Farm Credit Administration to be affixed hereto this 10th day of December 1990. This charter shall be effective January 1, 1991.

FARM CREDIT ADMINISTRATION
McLean, Virginia
Harold B. Steele

Chairman of the Board

Attest

Curtis M. Anderson
Secretary to the Board

FARM CREDIT SERVICES OF CENTRAL ARKANSAS, PCA BYLAWS

N. "Regulatlons"--FCA or the Assistance Board regula tions or directives applicable to and binding on this Association.
O. System"--the Farm Credit System.
P. Voting Stockholder"-- Member who has voting rights.

110-REFERENCES TO "BOARD"

All references in these Bylaws to the "Board" shall refer both to the Initial Board sitting as of the Charter Date and to the Permanent Board, unless otherwise indicated or the context otherwise requires.

ARTICLE II--LEGAL STATUS AND AUTHORITIES

200-LEGAL STATUS AND AUTHORITIES

This Association is a cooperative credit institution which is owned by its Members and is federally chartered pursuant to the Act. Subject to the Act and Regulations and under the supervision of the Bank, the Association in its chartered territory possesses and may exercise all lending, participation, and similar authorities granted by statute or regulation, as such statutes and regulations may be amended from time to time, to a production credit association. Without limiting the foregoing, these

authorities include authority to make, guarantee, and participate with other lenders in short- and intermediate- term loans and other financial assistance to (a) bona fide farmers and ranchers and producers or harvesters of aquatic products for agricultural or aquatic purposes and other requirements of such borrowers as specified in the Act, (b) rural residents for housing financing in rural areas, and (c) persons furnishing to farmers and ranchers farm-related services directly related to their on-farm operating needs. The Association also may provide technical assistance to borrowers, applicants, and Members and make available to them, at their option, such financially related services appropriate to their on-farm and aquatic operations as is determined feasible by the Bank board of directors under applicable Regulations.

ARTICLE III--ELIGIBILITY TO BORROW

300-MEMBERSHIP IN ASSOCIATION

Any person to whom this Association is authorized to extend credit or other services is eligible to apply for a loan or other services from this Association. In the case of a deceased or legally incompetent Member, the executor, administrator, guardian, or other legally authorized representative shall be considered to be the Member for the Members.

FARM CREDIT SERVICES OF WESTERN ARKANSAS, PCA POPE COUNTY, ARKANSAS

The Farm Credit Administration, in accordance with the Farm Credit Act of 1971, as amended (the Act), hereby charters a production credit association to be known as the Farm Credit Services of Western Arkansas, PCA (the Association). The principal office location of the Association shall be in the City of Russellville, County of Pope, State of Arkansas. The Association is a Farm Credit institution and a federally chartered instrumentality.

By this Federal charter, the Farm Credit Administration hereby authorizes said Association to exercise all powers conferred on the Association under the Act and the regulations of the Farm Credit Administration within the following territory:

> In the State of Arkansas, the Counties of Baxter, Benton, Boone, Calhoun, Carroll, Clark, Columbia, Conway, Crawford, Dallas, Faulkner, Franklin, Garland, Grant, Hempstead, Hot Spring, Howard, Johnson, Lafayette, Little River, Logan, Madison, Marion, Miller, Montgomery, Nevada, Newton, Ouachita, Perry, Pike, Polk, Pope, Saline, Scott, Searcy, Sebastian, Sevier, Union, Van Buren, Washington, and Yell.

IN WITNESS WHEREOF, the Chairman of the Farm Credit Administration Board has executed this charter and caused the seal of the Farm Credit Administration to be affixed hereto this 10th day of December 1990. This charter shall be effective January 1, 1991.

CHARTER NO. 7755

FARM CREDIT ADMINISTRATION
McLean, Virginia

Harold B. Steele
Chairman of the Board

Attest

Curtis M. Anderson
Secretary to the Board

FARM CREDIT SERVICES OF WESTERN ARKANSAS, PCA BY LAWS

BOARD APPROVAL DATE JANUARY 3, 1991

L. Member"--a holder of stock or participation certifi cates in the Association who may or may not be a Voting Stockholder.
M. "Permanent Board"--the Board of the Association other than the Initial Board.
N. "Regulations"--FCA or the Assistance Board regula tions or directives applicable to and binding on this Association.
O. "System"--the Farm Credit System.

P. "Voting Stockholder"--a Member who has voting rights.

110-REFERENCES TO "BOARD"

All references in these Bylaws to the "Board" shall refer both to the Initial Board sitting as of the Charter Date and to the Permanent Board, unless otherwise indicated or the context otherwise requires.

ARTICLE II--LEGAL STATUS AND AUTHORITIES

200-LEGAL STATUS AND AUTHORITIES

This Association is a cooperative credit institution which is owned by its Members and is federally chartered pursuant to the Act. Subject to the Act and Regulations and under the supervision of the Bank, the Association in its chartered territory possesses and may exercise all lending, participation, and similar authorities granted by statute or regulation, as such statutes and regulations may be amended from time to time, to a pro-

duction credit association. Without limiting the foregoing, these authorities include authority to make, guarantee, and participate with other lenders in short- and intermediate-term loans and other financial assistance to (a) bona fide farmers and ranchers and producers or harvesters of aquatic products for agricultural or aquatic purposes and other requirements of such borrowers as specified in the Act (b) rural residents for housing financing in rural areas, and (c) persons furnishing to farmers and ranchers farm-related services directly related to their on-farm operating needs. The Association also may provide technical assistance to borrowers, applicants, and Members and make available to them, at their option, such financially related services appropriate to their on-farm and aquatic operations as is determined feasible by the Bank board of directors under applicable Regulations.

ARTICLE III--ELIGIBILITY TO BORROW

300-MEMBERSHIP IN ASSOCIATION

EASTERN ARKANSAS PRODUCTION CREDIT ASSOCIATION CRAIGHEAD COUNTY, ARKANSAS

The Farm Credit Administration, in accordance with the Farm Credit Act of 1971, as amended (the Act), hereby charters a production credit association to be known as the Eastern Arkansas Production Credit Association (the Association). The principal office location of the Association shall be in the City of Jonesboro, County of Craighead, State of Arkansas. The Association is a Farm Credit institution and a federally chartered instrumentality.

By this Federal charter, the Farm Credit Administration hereby authorizes said Association to exercise all powers conferred on the Association under the Act and the regulations of the Farm Credit Administration within the following territory:

In the State of Arkansas, the Counties of Clay, Craighead,, Crittenden, Cross, Greene, Lee, Mississippi, Phillips, Poinsett, and St. Francis, and that part of Desha County lying north of the Arkansas River. In the State of Missouri, the Counties of Carter, Ripley, and Wayne. In the State of Tennessee, that portion of the Counties of Shelby, Tipton, and Lauderdale west of the channel of the Mississippi River as it now flows.

IN WITNESS WHEREOF, the Chairman of the Farm Credit Administration Board has executed this charter and caused the seal of the Farm Credit Administration to be affixed hereto this 10th day of December 1990. This charter shall be effective January 1, 1991.

CHARTER NO. 7754

FARM CREDIT ADMINISTRATION
McLean, Virginia

Harold B. Steele
Chairman of the Board

Attest

Curtis M. Anderson
Secretary to the Board

EASTERN ARKANSAS PRODUCTION CREDIT ASSOCIATION BYLAWS

JANUARY 1, 1991

ARTICLE II -- LEGAL STATUS AND AUTHORITIES

200-LEGAL STATUS AND AUTHORITIES

This Association is a cooperative credit institution which is owned by its Members and is federally chartered pursuant to the Act. Subject to the Act and Regulations and under the supervision of the Bank, the Association in its chartered territory possesses and may exercise all lending, participation, and similar authorities granted by statute or regulation, as such statutes and regulations may be amended from time to time, to a production credit association. Without limiting the foregoing, these authorities include authority to make, guarantee, and participate with other lenders in short- and intermediate-term loans and other assistance to (a) bona fide farmers and ranchers and producers or harvesters or aquatic products for agricultural or purposes and other requirements of such borrowers as specified in the Act, (b) rural residents for housing financing in rural areas, and (c) persons furnishing to farmers and ranchers farm-related services directly related to their on-farm operating needs. The Association also may provide technical assistance toborrowers, applicants, and Members and make available to them, - their option, such financially related services appropriate to their on-farm and aquatic operations as is determined feasible by the bank board of directors under applicable Regulations.

FARM CREDIT ADMINISTRATION

CERTIFICATE OP DISTRICT TO BE SERVED

BY

DELTA PRODUCTION CREDIT ASSOCIATION

WHEREAS the Delta Production Credit Association, with its principal office in the city of Dermott, county of Chicot, State of Arkansas has been organized and chartered under the Farm Credit Act of 1933, approved June 16, 1933; and

WHEREAS the Governor of the Farm Credit Administration is authorized by law to fix the territory within which its operations may be carried on;

Now, THEREFORE, pursuant to the authority vested in me, I, W. I. Myers, do hereby order that such district shall comprise the following territory in the state of Arkansas: All of Chicot county, all of Desha county except that part north of the Arkansas River, all of Drew county east of range line 4 West and all that part of Ashley county east of a line beginning on the north county line of Ashley county at a point midway between range lines 4 and 5; thence south to township line 18 south; thence west to range line 5 along township line 18; thence south along range line 5 to the south line of Ashley County.

In Witness Whereof I have hereunto set my hand and caused the seal of the Farm Credit Administration to be affixed on this 8th day of December, 1993.

W. I. Meyers
Governor of the Farm Credit Administration

ARTICLES OF INCORPORATION
of the
DELTA PRODUCTION CREDIT ASSOCIATION

We, the undersigned, each of whom is a farmer, for the purpose of organizing a production credit association pursuant to Title II of the Farm Credit Act of 1933, approved June 16, 1933, do hereby adopt the following Articles of Incorporation:

First: The name of this corporation shall be Delta Production Credit Association.

Second: The principal office of the corporation is to be located at___________ in the City of Dermott, County of Chicot, State or Ark., and its operations carried on, and its general business conducted, within such territory as may be prescribed by the Governor of the Farm Credit Administration, hereinafter referred to as the Governor.

Third: The general nature of the business of the corporation and the objects and purposes purposed to be transacted, promoted, or carried on by it, which shall also be construed as powers, are as follows; to wit:

(1) To have and exercise all authority and powers, and to do and perform all acts and to transact and conduct all business which legally may be had or done by production credit associations organized and chartered under and in accordance with the Farm Credit Act of 1933, as it exists or may be amended, and to do all other things incident thereto, and necessary and proper in connection therewith, within such territory as may be prescribed by the Governor; and particularly, but without limiting the generality of the foregoing:

(a) To make loans to farmers for general agricultural purposes;

Fourth: The corporate existence of the corporation shall commence on the approval of these Articles of Incorporation by the Governor and shall continue until dissolved in accordance with law.

Fifth: the authorized capital of the corporation shall be $100,000.00, divided into 20,000 shares of the par value of $5.00 each which shall consist of Class A stock and Class B stock in such amounts as may be determined from time to time by the Board of Directors of the corporation, with the approval of the President of the Production Credit Corporation of the district. Said classes of stock shall have the rights, privileges, powers and preferences, and shall be subject to the restrictions, limitations and qualifications, provided therefor in the Farm Credit Act of 1933, as the same now exists or may hereafter be amended, and further as provided in the by-laws of the corporation.

Sixth: The names and places of residence of each of the persons forming the corporation are as follows:

(Names omitted in printing)

Seventh: These Articles of Incorporation may at any time be altered or amended by order of the Governor.

(Signatures omitted in printing)

UNITED STATED DISTRICT COURT
FOR THE EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

(Title omitted in printing)

DEFENDANT'S MOTION TO EXTEND TIME FOR FILING RESPONSE TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

Comes now John Theis, Acting Commissioner of Revenue, Division of Revenue in the Arkansas Department of Finance and Administration, and makes this, his Motion to Extend Time, as follows:

1. On December 22, 1994, Plaintiffs filed a motion for summary judgment. Under Local Court Rule C-10, it appears that a response to this motion is due on or before January 3, 1995. Because of the Christmas holidays, planned vacation, and need for discovery, Defendant's counsel will be unable to adequately provide a response on or before January 3, 1995. (Defendant's counsel will not return to her office until January 3, 1995.)

2. Defendant's counsel has not received notice that the motion is set for hearing; however, Defendant' counsel was notified' of the July 1995 trial setting and the corresponding May 1995 discovery cut- off. Given that this matter is already set for trial and there is pending Defendant's Motion to Dismiss, Defendant respectfully requests that the time for responding to Plaintiff's Motion for Summary Judgment be extended until at least March 31, 1995.

Respectfully submitted,

BETH B. CARSON

(Certificate of Service omitted in printing)

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

(Title omitted in printing)

PLAINTIFFS' RESPONSE TO DEFENDANT'S MOTION TO EXTEND TIME FOR FILING RESPONSE TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

COME NOW, the Plaintiffs, Farm Credit Services of Central Arkansas, PCA, Farm Credit Services of Western Arkansas, PCA, Eastern Arkansas Credit Production Association, and Delta Production Credit Association, by and through their attorneys, Nichols, Wolff, Ledbetter & Campbell, and for their response to Defendant's Motion to Extend Time for Filing Response to Plaintiffs' Motion for Summary Judgment states as follows:

1. Plaintiffs admit the allegations contained in Paragraph 1.

2. Plaintiffs are without information to admit or deny the allegations contained in Paragraph 2.

3. Pleading further, plaintiffs would have consented to a reasonable extension due to the holiday season; however, no request from the defendant was ever made. Attached hereto is a copy of the correspondence sent ~~by~~ plaintiff after receiving defendant's motion consenting to a two (2) week extension.

4. Defendant's request for a ninety (90) day extension is excessive. Defendant is still collecting all state sales and income taxes during the pendency of this action. No good cause

exists for such an extraordinarily long extension. As such, the Court should limit any extension to the period of time not to exceed two (2) weeks.

WHEREFORE, plaintiffs pray that defendant's Motion to Extend Time for Filing Response to Plaintiffs' Motion for Summary Judgment extending the time for responding until March 31, 1995 be denied; however, plaintiffs would be agreeable to a two (2) week extension; for attorneys fees, costs, and any other equitable relief toward which plaintiffs may be entitled.

Respectfully Submitted,
Attorneys for Plaintiffs
NICHOLS, WOLFF, LEDBETTER
& CAMPBELL

By: Rufuss E. Wolff
Mark W. Nichols

(Certificate of Service omitted in printing)

(Letterhead omitted in printing)

December 30, 1994
Beth B. Carson

Re: Farm Credit Services of Central Arkansas, PCA, *et al.* v. State of Arkansas USDC NO. LR-C-54-394

Dear Beth:

I have received your letter and Motion dated December 27, 1994. I have checked my messages and I do not believe I received a telephone call from you requesting an extension. Please be advised that the plaintiffs have no objection to a reasonable

extension for you to answer the Motion for Summary Judgement. In fact, we anticipate filling a pleading with the Court alleging that we would consent to an extension of up to two (2) weeks. I note from your Motion, you are requesting a ninety (90) day extension. We cannot agree of such a long extension. As you know, the state still collects the state income and sales tax during the pendency of this action and we do not believe it is fair to grant such an extraordinarily long extension in light of these collection efforts.

Obviously, if the two (2) week extension is acceptable to you, please provide an Order which I will be happy to sign. If not, I will assume the Court would want a hearing on your Motion.

Should you have any questions, please do not hesitate to contact me.

Sincerely yours,

Mark W. Nichols

UNITED STATED DISTRICT COURT
FOR THE EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

(Title omitted in printing)

ORDER GRANTING EXTENSION OF TIME

After reviewing the request of the Defendant to extend the time to file its response to Plaintiff's Motion for summary judgment, the Court finds that Defendant's time for response is extended until January 24, 1995.

IT IS SO ORDERED.

Judge Henry Woods
Dated this 9 day of, January, 1995

PREPARED AND SUBMITTED BY:
Beth B. Carson

UNITED STATED DISTRICT COURT
FOR THE EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

(Title omitted in printing)

DEFENDANT'S RESPONSE TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

Comes now John H. Theis, Acting Commissioner of Revenue, Division of Revenue in the Arkansas Department of Finance and Administration, and makes this, his Response to Plaintiffs' Motion for Summary Judgment, as follows:

1. Plaintiffs have failed to support their motion with admissible evidence.
2. There are issues of material fact remaining.
3. Plaintiffs have failed to establish that they as production credit associations are immune from state taxation as federal instrumentalities.
4. Even if production credit associations are considered federal instrumentalities, any tax immunity has been waived by Congress.

WHEREFORE, premises considered, Defendant prays that Plaintiffs' complaint be dismissed.

Respectfully submitted,

Beth B. Carson

(Certificate of Service omitted in printing)

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

(Title omitted in printing)

DEFENDANT'S BRIEF IN SUPPORT
OF RESPONSE TO PLAINTIFFS' MOTION
FOR SUMMARY JUDGMENT

Comes now John H. Theis, Acting Commissioner of Revenue, Division of Revenue in the Arkansas Department of Finance and Administration, and makes this, his Brief in Response to Plaintiffs' Motion for Summary Judgment, as follows:

A. DISMISSAL FOR LACK OF SUBJECT MATTER JURISDICTION APPROPRIATE

Defendant again urges the court to dismiss this case for the grounds stated in Defendants Motion to Dismiss, i.e. lack of jurisdiction and failure to state a claim. As stated previously, Plaintiffs have failed to state a federal question for this court to decide. (Diversity is not a basis for jurisdiction because of 12 U.S.C. §2258.) The fact that the Plaintiffs are federally chartered by the Farm Credit Administration is also insufficient to raise a federal question. See 28 U.S.C. §1349 and 28 U.S.C. §451.

B. EVIDENTIARY OBJECTIONS

Defendant does not object to the representations contained in Plaintiffs' Statement of Facts; however, Defendant objects to the inclusion of only a portion of Plaintiffs' bylaws as those portions do not accurately reflect the corporate structure and duties of the Plaintiff production credit associations. Further, Defendant objects to the inclusion in the record of the charters and portions of bylaws as those documents have not been properly authenticated by affidavit or other certification based on personal knowledge. Defendant requests that the Court rule these documents inadmissible for purposes of Plaintiffs' motion. Finally, Plaintiffs have failed to support the facts contained in their motion by affidavit.

III. ISSUES OF MATERIAL FACT REMAINS

The fact that Plaintiffs were federally chartered and are referenced in a code section as federal instrumentalities does not automatically confer immunity from state taxation on them. There are genuine issues of material fact remaining that relate to whether for state taxation purposes Plaintiffs should be considered federal instrumentalities. Those issues are:

1. The specific functions performed by each Plaintiff and whether those functions are governmental functions or related to a governmental interest.
2. The control, if any, exercised by the United States through the Farm Credit Administration over Plaintiffs' operations and policy.
3. The nature of the ownership of Plaintiffs, e.g. whether stock issued by Plaintiffs is owned by individual investors or the United States Government.
4. Whether Plaintiffs' employees are treated as federal employees for purposes of hiring, benefits, termination, or other purposes.

IV. PRODUCTION CREDIT ASSOCIATIONS AS FEDERAL INSTRUMENTALITIES?

Plaintiffs have failed to establish that they (production credit associations) are immune from state taxation. The mere fact that 12 U.S.C. §2077 describes production credit associations as "federally chartered instrumentalities of the United States" does not end the inquiry. Whether a particular entity is entitled to immunity based on federal instrumentality status depends upon the action being taken against the entity. An entity may be immune for one purpose but not for another.[1] Several courts have determined that a federal land bank, which is an entity more tied to the Farm Credit Association that production credit associations, is not a governmental agency for various purposes including the Fifth Amendment. *DeLaigle v. Federal Land Bank of Columbia*, 568 F. Supp.

[1] *Hanna v. Federal Lank Bank Ass'n of S. Illinois*, 903 F.2d 1159 (7th Cir. 1990) held that production credit associations and federal land bank associations were not federal agencies for purposes of an employment discrimination action. This conclusion was based on Congress' intention that these entities be farmerowned and operated agencies rather than federal instrumentalities. *South Central Iowa Production Credit Ass'n v. Scanlan,*, 380 N.W.2d 699 (Iowa 1986) held that production credit associations were not federal instrumentalities for purposes of the Federal Tort Claims Act.

1432 (S.D. Ga. 1983) and cases cited within refused to "immunize" a federal land bank for these reasons:

> This Court finds the rationale of the *Cotton* court persuasive.[2] Without belaboring ground already covered by the *Cotton* court, this Court notes two additional points. First, even though Federal land banks are "federally chartered instrumentalities of the United States" pursuant to 12 U.S.C. §2011 (1976), the Congressional policy behind the Farm Credit Act of 1971, as stated in 12 U.S.C. §2001, establishes that Congress recognized that the Farm Credit System was to be "farmer owned" rather than owned by the federal government.
>
> Second, the former Fifth Circuit in *Roberts v. Cameron Brown Co.*, 556 F.2d 356 (5th Cir. 1977), stated that "[t]he government must be involved with the activity that causes the injury, ... and it is not enough to show that the government heavily regulates the private company whose activities are challenged." ... The Court concludes that the admittedly heavy regulation of federal land banks does not transform these entities into governmental agencies.

For state taxation purposes, even an otherwise private entity may be treated as a federal instrumentality; however, it depends upon the facts and circumstances of the entity's operations. In *Department of Employment v. United States*, 385 U.S. 355 (1966), Colorado attempted to collect state unemployment taxes from the American Red Cross. There, the U.S. Supreme Court

[2] In Federal Land Bank of Columbia v. Cotton, 410 F. Supp. 169 (N.D. Ga. 1976), the court applied the definition of "agency" in 28 U.S.C. §451 to conclude that a federal land bank, although chartered by the federal government, was not a federal "agency."

viewed the American Red Cross as "so closely related to governmental activity as to become a tax-immune instrumentality." The Court based its conclusion on the following: Congress chartered the original Red Cross in 1905; the Red Cross was subject to governmental supervision and audit; the principal officer and other officers in the agency are appointed by the President; the Red Cross was obligated by statute and Executive Order to comply with Geneva Conventions, to assist armed forces and to provide disaster relief to the states; the Red Cross received substantial federal government assistance; it was viewed as an arm of the government by Congress and the President. More importantly, the Red Cross had been specifically exempted from unemployment taxes and congressional reports specifically referenced its continuing exemption despite amendments to the relevant statutes.

A recent U.S. Supreme Court decision, *United States v. New Mexico*, 455 U.S. 720 (1982) summarizes the Court's view of federal immunity from state taxation. Although that case dealt with the taxation of a federal contractor, the discussion is helpful. Quoting from previous decisions, the Court stated:

> '[I]t is not necessary to cripple [the State's power to tax] by extending the constitutional exemption from taxation to those subjects which fall within the general application of non- discriminatory laws, and where no direct burden is laid upon the governmental instrumentality, and there is only a remote, if any, influence upon the exercise of the functions of government.' 455 U.S. 720,732.

The Court formulated a basic rule for state taxation:

> What the Court's cases leave room for, then, is the conclusion that tax immunity is appropriate in only one circumstance: when the levy falls on the United States itself, of on an agency or instrumentality so

> closely connected to the Government that the two cannot realistically be viewed as separate entities, at least insofar as the activity being taxed is concerned.[3] ... to resist the State's taxing power, a private taxpayer must actually "stand in the Government's shoes." 455 U.S. 720, 735-736.

In this case, there is no admissible, credible evidence presented by Plaintiffs concerning the operations of each Plaintiff upon which this Court may make a determination whether each Plaintiff is "so closely connected to the Government."

From Congressional records and a review of applicable laws, it is clear, however, that Congress did not intend for production credit associations to be viewed as equivalent to the Government and consequently treated as federal instrumentalities for state taxation purposes. In House Report No. 100-295, production credit associations are described not as Government owned or controlled, but rather Government sponsored. Farm Credit System debt is not guaranteed by the Federal government nor do production credit associations receive no-strings-attached federal funding. Although the stated objective of the Farm Credit Act is to promote the accessibility of credit to rural farmers, the method of achieving this goal is to permit farmers and ranchers to participate in the management, control and ownership of production credit associations.

12 U.S.C. §§2071 - 2077 describe the organization and powers of production credit associations. The organization is voluntary and is achieved by 10 or more farmers (or ranchers) filing articles of association with the Farm Credit Administration. The farmers agree to become stockholders of the production credit association in exchange for loans. Each production credit association elects its board of directors. Although regu-

[3] This standard was also stated in *United States v. California*, 123 L.Ed2d 528 (1993).

lated by the Farm Credit Administration, a production credit association has the power to sue and be sued, make contracts, hold property, operate under the board of directors, invest funds, borrow money from any institution, issue various classes of stock, prepare bylaws, and offer other financial related services to farmers including issuing insurance.[4] (If Plaintiffs provide the Court with complete copies of their bylaws, the Court will see that Plaintiffs are authorized to issue and sell a class of preferred stock for investors in addition to the classes of stock issued and sold to farmers.) Subject to the bylaws, a production credit association may also pay patronage dividends out of net earnings.

In conclusion, a production credit association is no more closely related to the federal Government than any other federally chartered and regulated financial institution. Production credit associations are equivalent to privately owned credit institutions and should not be afforded immunity from state sales, use and income tax liability.

V. IMMUNITY FROM STATE TAXATION CLEARLY WAIVED BY CONGRESS

Even if this court concludes that production credit associations should be viewed as federal instrumentalities legislative history and a reasonable reading of the law establish that these associations are not immune from state taxation. Prior to 1987, 12 U.S.C. §2077 (§2.17 of the Farm Credit Act of 1971) read as follows:

> Each production credit association and its obligations are instrumentalities of the United States and as such any and all notes, debentures, and other obligations issued by such association shall be exempt, both as to principal and interest from all taxation (except surtaxes, estate, inheritance, and gift taxes) now or hereafter imposed by the United States or any State, territorial, or local taxing authority. *Such associations, their property, their franchises, capital, reserves, surplus, and other funds, and their income shall be exempt from all taxation now or hereafter imposed by the United States or by any State, territorial, or local taxing authority; except that interest on the obligations of such associations shall be subject only to Federal income taxation in the hands of the holder thereof pursuant to the Public Debt Act of 1941 (cite omitted) and except that any real and tangible personal property of such associations shall be subject to Federal, State, territorial, and local taxation to the same extent as similar property is taxed. The exemption provided in the preceding sentence shall apply only for any year or part thereof in which stock in the production credit association is held by the Governor of the Farm Credit Administration.*

[4] *Commissioner of Insurance v. Jackson Production Credit Association*, 377 So.2d 1047 (Miss. 1979).

This specific exemption from state taxes for production credit associations was similar to exemptions for federal land banks (12 U.S.C. §2098), farm credit banks (12 U.S.C. §2023) and banks for cooperatives (12 U.S.C. §2134). The notable difference was that the exemption from state taxation only applied when the Governor of the Farm Credit Administration held the stock of the production credit association. Otherwise, even before 1987, production credit associations were subject to state taxation.

Section 2.17 of the Farm Credit Act of 1971 (12 U.S.C. §2077) was amended in 1987 by the Agricultural Credit Act to remove the underlined portions leaving the unmistakable conclusion that as of 1987, production credit associations were

subject to state taxation. References to the Governor of the Farm Credit Administration have been removed from the statutes governing production credit associations by Pub. L. 100-233.

The conclusion that production credit associations are subject to state taxation is bolstered by 12 U.S.C. §2214 which reads as follows:

> State and other laws shall apply to corporations organized pursuant to this part to the same extent such laws would apply to the organizing banks engaged in the same activity in the same jurisdiction; provided however, that to the extent that sections 2023, 2098, and 2134 of this title may exempt banks or associations of the Farm Credit System from taxation, such exemptions, other than with respect to franchise taxes, shall not extend to corporations organized pursuant to this part.

The corporations referenced in this section are service organized by a Farm Credit System bank or banks to service other banks. These service corporations are federally chartered and are described by 12 U.S.C. §2211 as federally chartered and an instrumentality of the United States; however, regardless of this designation, these corporations are subject to state taxation.

Even though 12 U.S.C.§2077 does not specifically state that production credit associations are taxable, *Graves v. N.Y.*, 306 U.S. 466 (1939) offers:

> Silence of Congress implies immunity no more than does the silence of the Constitution. It follows that when exemption from state taxation is claimed on the ground that the federal government is burdened by the tax, and Congress has disclosed no intention with respect to the claimed immunity, it is in order to consider the nature and effect of the alleged burden, and if it appears that there is no ground for implying a constitutional immunity, there is equally a want of any ground for assuming any purpose on the part of Congress to create an immunity. 306 U.S. 466, 480.

In conclusion, immunity from state taxation for production credit associations is not express or implied, and consequently must be denied.

WHEREFORE, premises considered, Defendant prays that Plaintiffs' motion for summary judgment be dismissed.

Respectfully submitted,

Beth B. Carson

(Certificate of Service omitted in printing)

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

PLAINTIFFS' REPLY TO DEFENDANT'S RESPONSE TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

COME NOW, the Plaintiffs, Farm Credit Services of Central Arkansas, PCA, Farm Credit Services of Western Arkansas, PCA, Eastern Arkansas Credit Production Association, and Delta Production Credit Association, by and through their attorneys, Nichols, Wolff, Ledbetter & Campbell, and respectfully submit their Reply to Defendant's Response to Plaintiffs' Motion for Summary Judgment, and state:

I. SUBJECT MATTER JURISDICTION AND SUFFICIENCY OF CLAIM

Plaintiffs' have stated a federal question based on affirmative federal preemption of action taken by Defendant. Defendant has refused to recognize Plaintiffs as federal instrumentalities in contravention to federal statutes (12 U.S.C. §§ 2071 and 2077) and denied Plaintiffs' tax exempts status in contravention to the Supremacy Clause of the United States Constitution. Plaintiffs have sought a declaration of the rights of the parties involved based on federal laws and the federal constitution. This clearly presents a claim for relief based upon a federal question which this Court has jurisdiction to resolve under 28 U.S.C. §1331.

II. EVIDENTIARY MATTERS

Defendant argues that Plaintiffs did not support the facts contained in their Motion for Summary Judgment with affidavits. Because this reference is not specific, Plaintiffs do not know what particular facts to which Defendant refers. However, Rule 56(a) of the Federal Rules of Civil Procedure provides that motion for summary judgment may be made with or without affidavits. Thus, Defendant's general reference is not sufficient to defeat Plaintiffs' Motion.

Defendant questions the inclusion of only portions of Plaintiffs Bylaws attached to their Rule 29 Statement of Facts. Plaintiffs are relying on a portion of the By laws only to show that they were federally chartered.. The rest of Plaintiffs' Bylaws are irrelevant for support of their Motion and need not be attached.

Rather than raise questions concerning immaterial matters, Defendant is required to meet proof with proof to defeat Plaintiffs' Motion. Mere allegations of factual issues are insufficient to show that a genuine issue of fact exists. *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986). Defendant relied on Plain-

tiffs' bylaws when denying tax refund and federal instrumentality status, as such, they are in possession of those Bylaws but did not offer them as proof in their Response, which F.R.C.P. 56(e) requires. Defendant failed to put forth facts showing the existence of a factual issue, and therefore, failed to carry its burden for purposes of defeating Plaintiffs' Motion for Summary Judgment.

III. AS A MATTER OF LAW PLAINTIFFS' STATUS AS FEDERAL INSTRUMENTALITIES IS NOT OPEN TO FACTUAL INQUIRY

In its response, Defendant argues that certain facts are necessary to determine Plaintiffs' status as federal instrumentalities. This case involves one question. Whether plaintiffs are federal instrumentalities is a question of law. Once Plaintiffs are found to be federal instrumentalities, they are exempt from state sales and income taxation.

Federal instrumentality status is conferred upon an entity in one of two ways: (1) where no statute exists conferring such status but the entity and the government are so closely connected that federal instrumentality status is deemed proper, see *Department of Employment v. United States*, 385 U.S. 355 (1966); *United States v. City of Adair*,, 539 F.2d 1185 (8th Cir. 1976), and (2) where congress has expressly conferred such status by legislation. See *Slotten v. Hoffman*, 999 F.2d 333 (8th Cir. 199[illegible]); Rohweder v. Aberdeen Prod. Credit Ass'n, 765 F.2d 109 (8th Cir. 1985); *Schlake v. Beatrice Prod. Credit A.ss'n*, 596 F.2d 278 (8th Cir. 1979); *FederaL Reserve Bank of St. Louis v Metrocentre Improvement Dist. #1*, 657 F.2d 183 (8th Cir. 1981). This case involves the latter.

Plaintiffs are federal instrumentalities pursuant to the express language of the following statutes:

> *12 U.S.C. §2071(a)*: Each production credit association shall continue as a Federally chartered in-

strumentality of the United States.

> 12 U.S.C. §2077: Each production credit association and its obligations are instrumentalities of the united States.

Since Congress specifically deemed Production Credit Associations to be federal instrumentalities, no fact inquiry into the nature of Plaintiffs is warranted. *Slotten*, 999 F.2d at 335 (holding that federal land bank as federal instrumentality was entitled to official immunity in tort action), *Rohweder*, 765 F.2d at 113 (holding that production credit associations as federal instrumentalities are not liable for punitive damages), and *Schlake*, 596 F.2d at 281 (stating that Congress had declared production credit associations to be federal instrumentalities). Additionally, the Eighth Circuit has specifically rejected the Defendant's argument that the closeness of the connection between the entity claiming federal instrumentality status and the federal government is a proper focus of the inquiry. *Metrocentre Improvement Dist.*, 657 F.2d at 185.

Defendant failed to cite one single Eighth Circuit case in support of its argument that a factual inquiry is necessary for determination of Plaintiffs' status. Not only does the Defendant ask the Court to disregard federal statutes that confer instrumentality status upon Plaintiffs, it also attempts to persuade the Court with reasoning that is not controlling and which the Eighth Circuit has refused to recognize.

IV. THE ISSUE OF LAW IN THIS CASE IS SETTLED

It is undisputed that federal instrumentalities are immune from state taxation unless Congress clearly, expressly, and affirmatively consents to such taxation. This rule, implied from the Supremacy Clause of the United States Constitution, was first laid down by the Supreme Court in *McCulloch v. Maryland*. 17 U.S. 316 (1819) and was subsequently reaffirmed in *Osborn v. Bank of* U.S., 22 U.S. 738 (1824), *Shaw v. Gibson-Zahniser Oil Corp.*, 276 U.S. 575 (1928), and *Mayo v. United States*, 319 u.S. 441 (1943). The Eighth Circuit has consistently followed this rule. See *United States v. City of Adair*, 539 F.2d 1185, 1189 (8th Cir. 1976); Metrocentre Improvement Dist., 657 F.2d at 186; Board or *Directors of Red River Levee v. Reconstruction Finance Corp.*, 170 F.2d 430, 431 (8th Cir. 1948).

In its argument, Defendant asserts that Plaintiffs are subject to state taxation upon three grounds:

1. Congress has not provided immunity;
2. Legislative history and a reasonable reading of the law establish consent to taxation; and
3. 12 U.S.C. §2214.

Based on the rule of implied constitutional immunity for federal instrumentalities, none of the proffered bases are persuasive.

First, Defendant argues that immunity from taxation must be expressly provided. Defendant's flawed argument is that because Congress has not expressly provided for immunity of Production Credit Associations from state sales and income taxes, it must follow that Congress impliedly waived such immunity.

This reasoning is incorrect. The Supreme Court in *McCulloch, Osborn, Shaw*, and *May, supra*, specifically held that constitutional immunity is implied. The rule of law requires that waiver of governmental immunity be express; an implied waiver is not effective. Defendant offers no controlling authority in support of its position while Plaintiffs have cited numerous cases in support of the correct rule of law.

Defendant attempts to confuse the issue by citing cases which refuse to extend federal instrumentality immunity to employees or contractors of the government. These cases are clearly

distinguishable.

Defendant cites *Graves v. New York ex rel O'Keefe*, 306 U.S. 466 (1939), where the Supreme Court held that a federal employee was not immune from state wage taxes. In reaching this conclusion, the Court distinguished between state taxation of a federal employee's salary and state taxation of the federal instrumentality itself, its property, or its income. The Court reasoned that the tax on wages was not paid by the corporation from its own funds. Id. at 480. This reasoning is the basis for the underlying policy of the doctrine of implied immunity of federal instrumentalities from state taxation. Where the tax places no burden on the federal instrumentality itself, then immunity from taxation is not implied. However, when the tax is upon the instrumentality itself and paid out of its funds, the tax is a burden and the implied restriction upon the taxing government controls. Id

Defendant also cites, *United States v. New Mexico*, 455 U.S. 720, 735 (1991). This case involved tax immunity of a federal contractor, and the discussion of the doctrine of constitutional immunity must be read in light of that fact. The contractor at issue did not have federal instrumentality status conferred by statute, it merely entered into contracts with the federal government. Therefore, the Court had to determine for itself the closeness of the connection between the contractor and the government for purposes of deciding the issue of tax immunity. Id. at 738.

Next, the Defendant argues that the legislative history and a "reasonable" reading of the statute show that immunity was not waived by Congress. Defendant bases this argument on the 1987 amendment to 12 U.S.C. §2077, which removed language providing for immunity of income from state taxation only to the extent that the Associations were owned by the Board of Governors. If it was the intent of Congress in its 1987 amendment to waive Production Credit Associations' tax immunity it could have done so through express legislation at that time. Without more, however, the mere deletion of part of the statute

does not constitute consent to taxation under the rule that congressional consent must be clear, express, and affirmative. Moreover, since the statue is clear, there is no need to consider speculative legislative history.

As for the reasonable reading part of Defendant's argument, again applying the rule of implied constitutional immunity, the fact that the language of the statue does not clearly, expressly, and affirmatively provide for state income and sales taxation of Production Credit Associations establishes that waiver of immunity was not conferred. A more reasonable reading of § 2077 shows that Congress provided for the outer limits of taxation of such entities by providing that the notes, debentures, and other obligations issued by each Production Credit Association are exempt from all federal and state taxation, except for surtaxes, estate, inheritance, and gift taxes. That the statute does not expressly address state taxation of income or sales tax means that Congress has not waived immunity to such taxation.

Lastly, Defendant cites 12 U.S.C. §2214 in support of its argument. This statute provides that service corporations organized by a Farm Credit System bank are subject to state taxation.

Rather than supporting its position, §2214 actually is an excellent example of how the rule of implied constitutional immunity works. Without §2214, states would lack authority to tax such corporations because they are federal instrumentalities, but because Congress provided for taxation through clear, express, and affirmative legislation (§2214), the states may constitutionally impose a tax on a federal instrumentality. Without this clear, express, and affirmative congressional legislation consenting to state income and sales taxation of Production Credit Associations, Defendant lacks such authority to tax.

CONCLUSION

Based on the foregoing, Defendant has not offered any evidence showing that there is a material issue of fact. The only issue involved is whether Production Credit Associations are federal instrumentalities. This is a question of law. Congress has deemed them to be federal instrumentalities and it has not waived the immunity which flows from this status with clear, express, and affirmative legislation. Therefore, Plaintiffs' Motion for Summary Judgment should be granted.

Respectfully Submitted,

Attorneys for Plaintiff

NICHOLS, WOLFF, LEDBETTER & CAMPBELL, P.A.

Mark W. Nichols
Rufus E. Wolff

(Certificate of Service omitted in printing)

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

FARM CREDIT SERVICES OF CENTRAL ARKANSAS, PCA; FARM CREDIT SERVICES OF WESTERN ARKANSAS, PCA; EASTERN ARKANSAS PRODUCTION CREDIT ASSOCIATION; and DELTA PRODUCTION CREDIT ASSOCIATION

PLAINTIFFS

V. No. LR-C-94-394

STATE OF ARKANSAS

DEFENDANT

ORDER

Plaintiffs are production credit associations chartered by the Farm Credit Association in accordance with the Farm Credit Act of 1971. In this lawsuit, plaintiffs seek declaratory judgment that they are exempt from state and local taxes and an injunction barring the State of Arkansas from imposing, assessing, or collecting taxes from them.

The defendant State of Arkansas has moved to dismiss the complaint for want of subject matter jurisdiction, for failure to state a claim and because the suit is barred by the Tax Injunction Act, 28 U.S.C. § 1341.

This Court does have subject matter jurisdiction to hear a claim for injunctive relief from a state regulation on the ground that the regulation is preempted by federal law. *Shaw v. Delta Air Lines. Inc.*, 463 U.S. 85 (1983). The complaint in this case does state a claim upon which relief can be granted. Plaintiffs

have been denied tax exempt status by the State of Arkansas. They need not wait until taxes are assessed against them to apply to this Court for relief.

The United States Supreme Court has squarely held that the Tax Injunction Act does not apply to "suits by the United States to protect itself and its instrumentalities from unconstitutional state exaction." *Department of Employment v. United States*, 385 U.S. 355, 358 (1966). The Motion to Dismiss is without merit, and is denied.

The plaintiffs have moved for summary judgment on the ground that they are federal instrumentalities and, as such, enjoy immunity from state and local taxation. There can be no serious dispute that the plaintiffs are federal instrumentalities. In at least three places in the United States Code, production credit associations are expressly referred to as "federal instrumentalities":

> 12 U.S.C. § 2071(a): "Each production credit association shall continue as a Federally chartered instrumentality of the United States."
>
> 12 U.S.C. § 2071(b)(7): "On approval of the proposed articles . . . the [production credit] association shall become as of such date a federally chartered body corporate and an instrumentality of the United States."
>
> 12 U.S.C. § 2077: "Each production credit association and its obligations are instrumentalities of the United States and as such any and all notes, debentures, and other obligations issued by such associations shall be exempt, both as to principal and interest, from all taxation . . . imposed by the United States or any State...."

Furthermore, the Court of Appeals for the Eighth Circuit has

specifically held production credit associations to be instrumentalities of the United States. *Rohweder v. Aberdeen Production Credit Association*, 765 F.2d 109 (1985).

The defendant argues that even if the plaintiffs are instrumentalities of the United States, that finding does not end the inquiry into plaintiffs' status as tax exempt. Defendant contends that the plaintiffs must demonstrate that they are federal instrumentalities for purposes of state taxation exemption. The defendant also argues that the plaintiffs' immunity from state taxation has been waived by Congress.

The defendant has failed to meet the plaintiffs' evidence that they are federal instrumentalities. Although the defendant complains that the plaintiffs included only some of their bylaws in support of the motion for summary judgment, the defendant has failed to offer other bylaws, or any other evidence, to indicate that the plaintiffs are not federal instrumentalities.

The defendant's argument that the plaintiffs must prove they are federal instrumentalities for purposes of exemption from state taxes is misplaced. It is true that Production Credit Associations do not enjoy all immunities of the United States, even though they are federal instrumentalities. However, implied immunity from state taxation for federal instrumentalities has been a settled niche in American jurisprudence since the early days of the Republic. Once it has been determined that the plaintiffs are federal instrumentalities, there arises an implied immunity from state and local taxation. *McCulloch v. Maryland*, 17 U.S. 316 (1819). *First Agriculture National Bank of Berkshire County v. State Tax Commission*, 392 U.S. 339 (1968).

The burden rests with the defendant to demonstrate that Congress has waived immunity from state taxation. Congress can waive tax immunity, but such waiver must be express:

> Congress must express a clear, express, and affirmative desire to waive the immunity from taxation enjoyed by a federal instrumentality.

Federal Reserve Bank of St. Louis v. Metrocentre Improvement District #1, 657 F.2d 183, 186 (8th Cir. 1981), aff'd 455 U.S. 995 (1982). Defendant has directed the Court to no express waiver from taxation, nor is the Court aware of any such express waiver. Thus, the defendant's only argument is that Congress has impliedly waived immunity from taxation for production credit associations. That is insufficient to sustain the burden.

Accordingly, the plaintiffs' Motion for Summary Judgment must be, and hereby is, granted. The defendant's Motion to Dismiss is denied. This case is dismissed.

DATED this 6th day of March, 1995.

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT
OF ARKANSAS WESTERN DIVISION

FARM CREDIT SERVICES OF CENTRAL ARKANSAS, PCA; FARM CREDIT SERVICES OF WESTERN ARKANSAS, PCA; EASTERN ARKANSAS PRODUCTION CREDIT ASSOCIATION; and DELTA PRODUCTION CREDIT ASSOCIATION

PLAINTIFFS

VS. NO. LR-C-94-394

STATE OF ARKANSAS

DEFENDANT

NOTICE OF APPEAL

Notice is hereby given that State of Arkansas, defendant above named, hereby appeals to the United States Court of Appeals for the Eighth Circuit from the Order granting plaintiffs' Motion for Summary Judgment and denying defendant's Motion to Dismiss entered in this action on the sixth day of March, 1995.

Respectfully submitted,

MARTHA G. HUNT
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Arkansas Supreme Court No. 87090
P. O. Box 1272, Room 209
Little Rock, AR 72203

COUNSEL FOR JOHN THEIS

IN THE UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

NO. 95-1856

STATE OF ARKANSAS

VS.

APPELLANT

FARM CREDIT SERVICES OF CENTRAL ARKANSAS, PCA; FARM CREDIT SERVICESOF WESTERN ARKANSAS, PCA; EASTERN ARKANSAS PRODUCTION CREDIT ASSOCIATION; and DELTA PRODUCTION CREDIT ASSOCIATION

APPELLEE

BRIEF FOR THE APPELLANT

BY: Martha G. Hunt
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SUMMARY OF THE CASE AND WAIVER OF REQUEST FOR ORAL ARGUMENT

Appellees are four Production Credit Associations chartered by the Farm Credit Association who filed an action in the United States District Court for the Eastern District of Arkansas against Appellant State of Arkansas seeking a declaratory judgment that they are exempt from state and local taxes and an injunction against the imposition or assessment of such taxes by the State of Arkansas. Appellees moved for summary judgment on the basis that the applicable statutory provisions granted Production Credit Associations immunity from taxation as instrumentalities of the United States. Appellant's response to the motion denied that summary judgment was appropriate on the basis that statutory language conferring federal instrumentality status was not sufficient to confer immunity from state taxation; that immunity so conferred, if any, has been waived by Congress; and that summary judgment was not appropriate because of the existence of genuine issues of material fact which would be determinative on the issue of whether the function, control, ownership and operation of appellees allowed them to be considered "governmental" or private entities. The district court granted Appellees' Motion for Summary Judgment, from which this appeal is sought.

Appellant State of Arkansas waives oral argument. Adequate opportunity is afforded Appellant to present its case in the briefs.

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PRELIMINARY STATEMENT AND STATEMENT OF JURISDICTION

United States District Judge Henry Woods rendered the decision from which this appeal is sought in Case Number LR-C-94-394 in the United States District Court for the Eastern District of Arkansas.

Jurisdiction in the District Court of an action for declaratory judgment was proper pursuant to Article Six, Clause Two of the United States Constitution and 28 U.S.C. § 1331.

The Court of Appeals has jurisdiction of this appeal from the order of the District Court pursuant to 28 U.S.C. § 1291. The Order of the District Court granting summary judgement to Appellants was entered on March 6, 1995. The Notice of Appeal was timely filed in the District Court on April 3, 1995, within the thirty day requirement imposed pursuant to F.R.A.P. Rule 4, 28 U.S.C.A.

STATEMENT OF ISSUES

Whether statutory language granting federal instrumentality status to Production Credit Associations is sufficient to render them exempt from state tax.

United States v. New Mexico, 455 U.S. 720, 102S.Ct. 1373, 71 L.Ed. 2d 580 (1982)

Hanna v. Federal Land Bank Association of Southern Illinois, 903 F.2d 1159 (7th Cir. 1990)

National R.R. Passenger Corp. v. Boston & Maine Corp., 503 U.S. ___, 112 S.Ct. 1394, 118 L. Ed.2d 52, 66 (1992)

12 U.S.C. § 2077

Whether any immunity from state taxation conferred by statute to Production Credit Associations has been waived.

Farm Credit Act of 1933, Pub. L. No. 73-98, § 63, 48 Stat. 257, 267

Farm Credit Amendments Act of 1985, Pub. L. 99-205, 99 Stat. 1678 (1985)

12 U.S.C. §§ 2023 and 2098

12 U.S.C. § 2214

Whether defendant presented a genuine issue of material fact regarding the waiver of immunity from taxation of Production Credit Associations sufficient to preclude the granting of a Motion for Summary Judgment that plaintiffs are tax exempt.

Celotex Corp. v. Catrett, 477 U.S. 317, 322-23, 106 S.Ct. 2548, 2552-53, 91 L.Ed. 265 (1986)

Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249-50, 106 S.Ct. 2505, 2510-11, 91 L.Ed.2d 202 (1986)

Langley v. Allstate Insurance Co., 995 F.2d 841 (8th.Cir.1993)

Get Away Club, Inc. v. Coleman, 969 F.2d 664, 666 (8th Cir. 1992)

STATEMENT OF THE CASE

The District Court case was an action seeking a declaratory judgment that Appellees, four Production Credit Associations, are exempt from state and local taxes and an injunction against the imposition or assessment of such taxes by the State of Arkansas. Appellees moved for summary judgment on the basis that the plain language of the applicable statutory provisions granted immunity from taxation to Production Credit Associations as instrumentalities of the United States. Appellant responded that summary judgment was not appropriate on the basis that statutory language conferring federal instrumentality status was not sufficient to confer immunity from state taxation; that any immunity so conferred has been waived by Congress; and that genuine issues of material fact as to the functions, control and ownership of appellees was determinative of whether appellees functioned as "governmental" agencies. The district court granted Appellees' Motion for Summary Judgment, from which this appeal is sought.

STATEMENT OF FACTS

By letter dated May 5, 1994, Appellees requested an opinion of the Department of Finance and Administration of the State of Arkansas that Farm Credit Services of Central Arkansas, PCA, a production credit association, is exempt from state and local taxes due to its status as a federal instrumentality. By opinion letter dated May 26, 1995, Appellant refused to acknowledge that the PCA was exempt as a federal instrumentality. On June 17, 1994, Appellees, the PCA denied exempt status by Appellant and three other production credit associations, filed a Complaint for Declaratory Judgment seeking a declaratory judgment that Appellees are exempt from state and local taxes and an injunction against the imposition or assessment of such taxes by the State of Arkansas. Appendix P. 1.

Appellant filed a Motion to Dismiss Complaint and Brief in Support on July 6, 1994. Appendix P. 14. Appellees filed a Response to Defendant's Motion to Dismiss on July 15, 1994. Appendix P. 23. Appellees filed a Motion for Summary Judgment and Brief in Support on December 22, 1994. Appendix P. 31. Appellants requested an extension of time of ninety days in which to respond and were granted an extension to January 24, 1995 in which to respond. Appendix P. 65. Appellant filed a Response to Motion for Summary Judgment and Brief in Support on January 23, 1995. Appendix P. 66. Appellees filed a Reply to Defendant's Response on February 6, 1995. Appendix P. 78.

The District Court entered its Order granting Appellees Motion for Summary Judgment on March 6, 1995.

SUMMARY OF THE ARGUMENT

The fundamental question presented in this appeal is whether a production credit association, an entity created by the Farm Credit Act of 1933, is exempt from the imposition of state tax.

Appellees urge, and the district court agreed, that the "plain" language of the statute conferring instrumentality status on PCA's is sufficient to immunize them from the imposition of state tax. In 1982, the United States Supreme Court examined the precedents in the doctrine of federal immunity from state taxation and determined that immunity was proper only where the entity to be taxed was so closely related to the Government that it could be said to "stand in the shoes of the Government."

The statutory structure of the Farm Credit System encourages the participation of the borrowers, the farmers and ranchers who organize the association, own the stock, and elect the directors of the PCA, and demonstrates the separation between Farm Credit System institutions, particularly PCA's, and the federal government. The Farm Credit Administration acts as an "arm's length" regulator of the associations rather than a day-to-day supervisor. The statutory statement that a PCA is a Federal instrumentality does not, of itself, transform a PCA into a "government" entity, especially when the operation, ownership, and control of the PCA indicates that it is not governmental, but private. The plain language of 12 U.S.C. § 2077 is not sufficient to confer such immunity. Instead, the test of whether a PCA is an "instrumentality" for purposes of immunity from taxation is whether the activities of the PCA are "so closely connected to the Government that the two cannot realistically be viewed as separate entities."

Various statutory provisions of the present Farm Credit System legislation, as well as the legislative history of the acts creating and amending the Farm Credit System, provide a clear

indication that Congress intended to waive any exemption provided to production credit associations by virtue of their status as federal instrumentalities. The 1933 act creating production credit associations provided that the exemption from taxation for PCA's no longer applied after the PCA stock owned by the Government was retired. In 1985, this section was amended by striking the sentence providing the specific exemption and the waiver. Subsequent legislative history reveals that the intention of Congress in striking these sentences was to remove the reference to the Governor, a position which the amendment abolished, rather than to provide a specific exemption from taxation for PCA's. The statutory language in the sections addressing the taxation of banking institutions of the Farm Credit System provides a more specific exemption from tax for those institutions than does the statutory language addressing taxation of PCA's. This, as well as other statutory language, reflect Congressional intent that PCA's not be afforded total immunity from taxation.

The district court erred by granting the appellees' motion for summary judgment based upon its acceptance of the interpretation of the statute urged by the appellees, without affording appellant an opportunity to present evidence as to the genuine issues of material fact raised by appellant, including a factual finding as to the functions performed by the appellees, and whether those functions are governmental; the control exercised over appellees by the Farm Credit Administration; whether the stock of appellees is owned by the government or by individual investors; and whether appellees' employees are treated as federal employees, all of which factual issues are determinative of appellees' status as private or governmental entities, capable of "standing in the shoes of the Government.

ARGUMENT

I.

THE "PLAIN LANGUAGE" OF 12 U.S.C.A.§ 2077 DOES NOT PROVIDE TOTAL IMMUNITY FROM STATE TAXATION TO A PRODUCTION CREDIT ASSOCIATION

Appellees assert, and the district court agreed, that Production Credit Associations (hereinafter referred to as "PCA's") have been granted immunity from the imposition of state tax by 12 U.S.C. § 2077 which provides:

> Each production credit association and its obligations are instrumentalities of the United States and as such any and all notes, debentures, and other obligations issued by such associations shall be exempt, both as to principal and interest, from all taxation (except surtaxes, estate, inheritance, and gift taxes) now or hereafter imposed by the United States or any State, territorial, or local taxing authority, except that interest on such obligations shall be subject to Federal income taxation in the hands of the holder.

In order to accept the position urged by appellees, it is necessary to concede that the "plain language" of the statute states, without ambiguity, that a production credit association is immune from any tax which the State of Arkansas might attempt to impose. Appellant does not dispute that in statutory construction, the "starting point is the language of the statute." *Dole v. United Steelworkers of America*, 494 U.S. 26, 110 S.Ct. 929, 934, 108 L.Ed.2d 23 (1990) (quoting *Schreiber v. Burlington Northern, Inc.*, 472 U.S. 1, 5, 105 S.Ct. 2458, 86 L.Ed.2d 1 (1985). However, statutory language is frequently capable of more than one interpretation. As expressed by the Supreme Court in *National R.R. Passenger Corp. v. Boston & Maine*

Corp., 503 U.S. ___, 112 S.Ct. 1394, 118 L. Ed.2d 52, 66 (1992), "[f]ew phrases in a complex scheme of regulation are so clear as to be beyond the need for interpretation when applied in a real context."Appellees contend that the language in 12 U.S.C.A. § 2077 confers federal instrumentality status on production credit associations, and as such they are entitled to immunity from state taxation. In prior decisions, the United States Supreme Court has held that federal instrumentalities, and in particular federal land banks, which like production credit associations are a part of the Farm Credit System, are immune from taxation by virtue of their performance of governmental functions. *See, e.g., Federal Land Bank of Wichita v. Board of County Commissioners*, 368 U.S. 146, 82 S.Ct. 282, 7 L.Ed.2d 199 (1961); *Federal Land Bank of Saint Paul v. Bismarck Lumber Co.*, 314 U.S. 95, 62 S.Ct. 1, 86 L.Ed. 65 (1941). However, in its 1982 decision in *United States v. New Mexico*, 455 U.S. 720, 102 S.Ct. 1373, 71 L.Ed.2d 580 (1982), the Supreme Court clarified the doctrine of federal immunity from state taxation:

> With the famous declaration that "the power to tax involves the power to destroy," *McCulloch v. Maryland*, 4 Wheat 316, 431, 4 L.Ed. 579 (1819), Chief Justice Marshall announced for the Court the doctrine of federal immunity from state taxation. In so doing he introduced the Court to what has become a "much litigated and often confused field," *United States v. City of Detroit*, 355 U.S. 466, 473, 2 L.Ed.2d 424, 78 S.Ct. 474 (1958), one that has been marked from the beginning by inconsistent decisions and excessively delicate distinctions.
>
> ...
>
> We have concluded that the confusing nature of our precedents counsels a return to the underlying constitutional principle. The one constant here, of course, is simple enough to express: a State may not, consistent with the Supremacy Clause, U.S.

> Const, Art VI, cl 2, lay a tax "directly upon the United States." *Mayo v. United States*, 319 U.S. 441, 447, 87 L.Ed. 1504, 63 S.Ct. 1137, 147 ALR 761 (1943). While "[o]ne could, and perhaps should, read M'Culloch . . . simply for the principle that the Constitution prohibits a State from taxing discriminatorily a federally established instrumentality," *First Agricultural Bank v. State Tax Comm'n*, 392 U.S. 339, 350, 20 L.Ed.2d 1138, 88 S.Ct. 2173 (1968) (dissenting opinion), the Court has never questioned the propriety of absolute federal immunity from state taxation.
>
> ...
>
> But the limits on the immunity doctrine are, for present purposes, as significant as the rule itself. Thus, immunity may not be conferred simply because the tax has an effect on the United States, or even because the Federal Government shoulders the entire economic burden of the levy.
>
> ...
>
> What the Court's cases leave room for, then, is the conclusion that tax immunity is appropriate in only one circumstance: when the levy falls on the United States itself, or on any agency or instrumentality so closely connected to the Government that the two cannot realistically be viewed as separate entities, at least insofar as the activity being taxed is concerned. This view, we believe, comports with the principal purpose of the immunity doctrine , that of forestalling "clashing sovereignty," *McCulloch v. Maryland*, 4 Wheat, at 430, 4 L.Ed. 579, by preventing the States from laying demands directly on the Federal Government. See *City of Detroit v. Murray Corp.*, 355 U.S. at 504-505, 2 L.Ed 441, 78 S.Ct. 458 (opinion of Frankfurter, J.). As the federal structure-along with the workings of the tax

> immunity doctrine-has evolved, this command has taken on essentially symbolic importance, as the visible "consequence of that [federal] supremacy which the constitution has declared." *McCulloch v. Maryland*, 4 Wheat, at 436, 4 L.Ed 579. At the same time, a narrow approach to governmental tax immunity accords with competing constitutional imperatives, by giving full range to each sovereign's taxing authority. See *Graves v. New York ex rel. O'Keefe*, 306 U.S. at 483, 83 L.Ed. 927, 59 S.Ct. 595, 120 ALR 1466.
>
> Thus a finding of constitutional tax immunity requires something more than the invocation of traditional agency notions: to resist the State's taxing power, a private taxpayer must actually "stand in the Government's shoes." *City of Detroit v. Murray Corp.*, 355 U.S. at 503, 2 L.Ed. 2d 441, 78 S.Ct. 458 (opinion of Frankfurter, J.).

71 L.Ed.2d at 589, 591, 592, 593.

Following the opinion in *United States v. New Mexico*, the test is whether a production credit association is an "instrumentality so closely connected to the Government that the two cannot realistically be viewed as separate entities." The *Bismarck* Court, supra, indicated that Congress had authority to immunize from taxation all activities "connected with, or in furtherance of, the lending functions of federal credit agencies." 314 U.S. at 103. Subsequent to the Court's holding in *Bismarck*, various jurisdictions have concluded that federal land banks and production credit associations are more like private corporations than federal agencies for various purposes. *See e.g., Hanna v. Federal Land Bank Association of Southern Illinois*, 903 F.2d 1159 (7th Cir. 1990) (federal land bank and production credit associations held private employer without

sufficient governmental involvement to constitute federal agencies exempt from jury trial in action by form employee); *Birbeck v. Southern New England Production Credit Association*, 606 F.Supp. 1030 (D.Conn. 1985) (production credit association considered private entity rather than governmental agency for purposes of invoking federal due process clause); *DeLaigle v. Federal Land Bank of Columbia*, 568 F.Supp. 1432 (S.D.Ga.1983) (federal land bank held private corporation without sufficient governmental involvement to support cause of action under federal due process clause); *Federal Land Bank of Columbia v. Cotton*, 410 F. Supp. 169 (N.D.Ga. 1975) (federally chartered corporation is not an "agency" unless the government has a substantial proprietary interest in it, or at least exercises considerable control over operation and policy of the corporation; held federal land bank was meant to be private, rather than governmental, corporation for purposes of federal district court jurisdiction).

Although the above cited cases address federal instrumentality status of production credit associations and other Farm Credit System institutions for purposes other than taxation, they support the proposition that these Farm Credit System institutions are entities separate and distinct from the federal government in many respects, and that heavy federal regulation alone is not sufficient to transform a private entity into an entity which "stands in the Government's shoes." Although the Farm Credit Administration regulates the System, the stated objective of the Farm Credit Act is to encourage the participation of farmer- and rancher borrowers in the management, control, and ownership of a farm credit system, rather than supervising day to day System management. 12 U.S.C.A. §§ 2001, 2002 (West 1989). The Farm Credit Act and amendments demonstrate the separation between Farm Credit System institutions, particularly PCA's, and the federal government. Each PCA is organized and owned by the farmers and ranchers who are the borrowers, not the government, and is controlled

by an independent board of directors elected by the members. 12 U.S.C.A. §§ 2071, 2072, 2073 (West 1989).

Based on the structure and stated objectives of the Farm Credit System and the foregoing cases, production credit associations are not so closely connected to the federal government as to confer upon them immunity from state taxation. The holdings of the Eighth Circuit in *Rohweder v. Aberdeen Production Credit Association*, 765 F.2d 109 (8th Cir. 1985) and *Schlake v. Beatrice Production Credit Association*, 596 F.2d 278 (8th Cir. 1979) are distinguishable from the case herein. In *Rohweder*, the issue is whether the "sue and be sued" clause in the enabling legislation for production credit associations constitute statutory authorization of punitive damage awards against a production credit association as a federal instrumentality. In *Schlake* the issue is whether the federal instrumentality status of production credit associations vest subject matter jurisdiction in the federal courts under the due process clause. The Court recognizes that production credit associations are federal instrumentalities in each of these cases. However, in neither opinion does the Court acknowledge that based solely upon this statutory status a production credit association "stands in the shoes of the Government."

The statutory statement that a PCA is a Federal instrumentality does not, of itself, transform a PCA into a "government" entity, especially when the operation, ownership, and control of the PCA indicates that it is not governmental, but private. The plain language of 12 U.S.C. § 2077 is not sufficient to confer such immunity. Instead, the test of whether a PCA is an "instrumentality" for purposes of immunity from taxation is whether the activities of the PCA are "so closely connected to the Government that the two cannot realistically be viewed as separate entities. *United States v New Mexico*, supra.

II.
CONGRESS DID NOT INTEND TO GRANT ABSOLUTE IMMUNITY FROM THE IMPOSITION OF STATE TAXATION TO PRODUCTION CREDIT ASSOCIATIONS

An examination of the history of the Farm Credit System is helpful to an analysis of whether an exemption from taxation has been afforded PCA's, and, if so, whether it has been waived.

The Farm Credit System was created in 1916 to provide agricultural credit to American farmers. The Federal Farm Loan Act, Pub. L. No. 64-158; 39 Stat. 360 (1916) provided for the establishment of twelve district Federal land banks whose purpose was to make long-term loans through Federal land bank associations to farmers. The twelve district Federal intermediate credit banks were created by the Agricultural Credits Act of 1923 to fund short and intermediate term loans.

The Farm Credit Act of 1933, Pub. L. No. 73-98; 48 Stat. 257 (1933) established the Farm Credit Administration, an independent federal agency comprised of the thirteen member Federal Farm Credit Board who hired a full time Governor and other officers and employees, with responsibility to oversee the banks and associations comprising the system. This legislation incorporated the provisions regarding the associations created in 1916 and 1923 and created Production Credit Associations and Banks for Cooperatives. The PCA's purpose was to obtain short and intermediate-term loans from Federal intermediate credit banks in order to facilitate the delivery of credit services to farmers and ranchers. The Banks for Cooperatives were to make loans and provide credit services to agricultural, aquatic, and rural utility cooperatives. At their inception, the stock in PCAs was owned by both the government and by farmers and ranchers.

The Farm Credit Act of 1971, Pub. L. No. 92-181, 85 Stat. 583 (1971), the purpose of which, according to the legislative history, was to rewrite, modernize, and streamline the statutory authority of the Farm Credit System, repealed most of the existing statutory authority for the Farm Credit System in the rewriting process. The resulting Farm Credit System consisted of twelve Farm Credit Districts, in each of which was located three System banks: a Federal land bank, a Federal intermediate credit bank, and a bank for cooperatives. *See generally*, H. R. Rep. No. 593, 92d Cong., 1st Sess., reprinted in 1971 U.S. Code Cong. & Admin. News 2091. In the early 1980's the depressed agricultural economy resulted in financial stress on the Farm Credit System. The Committee on Agriculture began consideration of amendments to the Farm Credit System legislation to address these problems. The purposes of the amendments were to reorganize and strengthen the Farm Credit Administration, the federal agency which supervises Farm Credit System activities. This would be done by removing the day-to-day participation and make the agency an "arm's-length" regulator. The existing thirteen member part-time Board would be replaced by a full-time three member Board and the position of Governor abolished. *See generally*, H. R. Rep. No. 425, 99th Cong., 1st Sess., reprinted in 1985 U.S. Code Cong. & Admin. News 2587.

In 1933, the statute which addressed the taxation of PCA's at their creation, as well as that of the Central Bank for Cooperatives, the Production Credit Corporations, and Bank for Cooperatives, read as follows:

> The Central Bank for Cooperatives, and the Production Credit Corporations, Production Credit Associations, and Banks for Cooperatives, organized under this Act, and their obligations, shall be deemed to be instrumentalities of the United States, and as such, any and all notes, debentures, bonds, and other

> such obligations issued by such banks, associations, or corporations shall be exempt both as to principal and interest from all taxation (except surtaxes, estate, inheritance, and gift taxes) now or hereafter imposed by the United States or by any State, Territorial, or local taxing authority. Such banks, associations, and corporations, their property, their franchises, capital, reserves, surplus, and other funds, and their income, shall be exempt from all taxation now or hereafter imposed by the United States or by any State, Territorial, or local taxing authority; except that any real property and any tangible personal property of such banks, associations, and corporations shall be subject to Federal, State, Territorial, and local taxation to the same extent as other similar property is taxed. *The exemption provided herein shall not apply with respect to any Production Credit Association or its property or income after the stock held in it by the Production Credit Corporation has been retired, or with respect to the Central Bank for Cooperatives, or any Production Credit Corporation or Bank for Cooperatives, or its property or income after the stock held in it by the United States has been retired.* (emphasis added)

Farm Credit Act of 1933, Pub. L. No. 73-98, § 63, 48 Stat. 257, 267.

The Farm Credit Act of 1971 repealed the existing farm credit legislation and rewrote the Farm Credit Act. The existing tax status of PCA's was reenacted under the PCA section of the bill (Sec. 2.17), with little change in the language of the statute other than the removal of the reference to the associations other than PCA's. *See*, H. R. Rep. No. 593, 92d Cong., 1st Sess., reprinted in 1971 U.S. Code Cong. & Admin. News 2091, 2111.

The language of the waiver of exemption from taxation, following the 1971 amendment read, "The exemption provided in the preceding sentence shall apply only for any year or part thereof in which stock in the production credit associations is held by the Governor of the Farm Credit Administration." Farm Credit Act of 1971, Pub. L. No. 92-181, § 2.17, 85 Stat. 583, 602 (1971).

Decisions that occurred during the period following the retirement of all PCA stock held by the Government, while not decided under current law, are indicative of the clear statutory waiver of the exemption. *See e.g., Woodland Production Credit Association v. Franchise Tax Board*, 37 Cal. Rptr. 231 (1964) (statutory waiver of exemption from taxation of PCA's permits taxation of the corporation itself; thus PCA not exempt from California franchise tax which is a tax on the income of the corporation); *Columbus Production Credit Association v. Bowers*, 173 Ohio St. 97, 180 N.E.2d 1 (1962), cert. den. 371 U.S. 826, 83 S.Ct. 47, 9 L.Ed.2d 65 (production credit association held not exempt from Ohio franchise tax; exemption from state taxation waived by Congress in provision that exemption will not apply after the stock in the PCA held by the governor has been retired).

The Farm Credit Amendments Act of 1985, Pub. L. 99-205, 99 Stat. 1678, 1705 (1985) amended the section relating to the taxation of PCA's by "striking out the last two sentences of section 2.17." This amendment was included in Section 205 which "contains numerous technical and conforming amendments to the provisions of the Farm Credit Act of 1971 affected by changes in the basic powers, duties and authorities of the Farm Credit Administration." H.R. Rep. No. 425, 99th Cong., 1st Sess. reprinted in 1985 U.S. Code Cong. & Admin. News 2587, 2615. The intent, as reflected in legislative history, was to remove references to the Governor of the Farm Credit Administration , "since such office . . . will no longer exist . . ."

Id. at 2615. The last two sentences so stricken read:

> Such associations, their property, their franchises, capital, reserves, surplus, and other funds, and their income, shall be exempt from all taxation now or hereafter imposed by the united States or by any State, Territorial, or local taxing authority, except that interest on the obligations of such association shall be subject only to Federal income taxation in the hands of the holder thereof pursuant to the Public Debt Act of 1941 (31 U.S.C. 742(a)) and except any real and tangible personal property of such associations shall be subject to Federal, State, Territorial, and local taxation to the same extent as similar property is taxed. The exemption provided in the preceding sentence shall apply only for any year or part thereof in which stock in the production credit associations is held by the Governor of the Farm Credit Administration.

The February 23, 1988 daily edition of the Congressional Record, contains a discussion in the House of Representatives between Mr. De La Garza, Chairman of the Committee on Agriculture at the time of the 1985 amendments to the Farm Credit Act, and Mrs. Smith of Nebraska, which directly addresses the deletion of the two sentences in the section addressing taxation of PCA's. The relevant portions of that discourse include the following:

> Mrs. SMITH of Nebraska. Mr. Speaker, I have been alerted by the Nebraska Department of Revenue of an oversight in the 1985 farm credit amendments (Public Law 99-205) that has technically exempted Production Credit Associations and Banks for Cooperatives from property taxation. Section 205, under the heading technical and conforming amend-

ments, amends section 2.17 and 3.13 of the Farm Credit Act (12 U.S.C. 2098 and 12 U.S.C. 2134) by striking out the last two sentences in both sections. Is this the gentleman's understanding?

(NOTE: At that time, Section 2.17 was codified as 12 U.S.C. §2098, presently § 2077.) (explanation added)

Mr. De La GARZA. The gentlewoman is correct.

Mrs. SMITH of Nebraska. It is my understanding that these changes were made to delete references to the Governor of the Farm Credit Administration to conform to changes made elsewhere in the 1985 Farm Credit Amendments Act. Is that the gentleman's understanding?

Mr. De La GARZA. That is my understanding as well.

Mrs. SMITH of Nebraska. The sentences that were deleted pertained to the taxation of real and tangible personal property held by Banks for Cooperatives and Production Credit Associations. The amended sections I have referenced stated that property, income, capital, and reserves of such associations are exempt from all taxation except that any real and tangible personal property would be subject to Federal, State, territorial, and local taxation to the same extent as similar property.

Mr. De La GARZA. That is the way those sections read before the technical corrections were made in 1985.

Mrs. SMITH of Nebraska. Were these changes made

with the intent to exempt real and tangible personal property held by such associations from property taxation.

Mr. De La GARZA. To my understanding, that was not the intent of my committee, nor of the committee of conference on the 1985 farm credit amendments.

Mrs. SMITH of Nebraska. Is it your understanding that although local governments are not given specific authority to levy property taxes on property owned by such associations, they are not prevented from doing so?

Mr. De La GARZA. Mr. Speaker, I would inform the gentlewoman from Nebraska [Mrs. Smith] that that is the advice of our legal counsel and certainly consistent with my understanding of the conference.

134 Cong. Rec. H 462 (daily ed. February 23, 1988) (discussion between Reps. De La Garza and Smith)

A comparison of the statutory language addressing the taxation of the Farm Credit banking associations to that of PCA's is also helpful. 12 U.S.C. § 2023 provides:

> The Farm Credit Banks and the capital, reserves, and surplus thereof, and the income derived therefrom, shall be exempt from Federal, State, municipal, and local taxation, except taxes on real estate held by a Farm Credit Bank to the same extent according to its value, as other similar property held by other persons is taxes. The mortgages held by the Farm Credit Banks and the notes, bonds, debentures, and other obligations issued by the banks

> shall be considered and held to be instrumentalities of the United States, and, as such, they and the income therefrom shall be exempt from all Federal, State, municipal, and local taxation, other than Federal income tax liability of the holder thereof under the Public Debt Act of 1941 (31 U.S.C. 3124).

The language in Section 2098 of Title 12, the section on taxation of Federal land bank associations, is identical to the language of Section 2023 with the words "Federal land bank associations" replacing the words "Farm Credit Banks" each time they appear in the section.

A statutory provision in the Farm Credit Act which reflects that Congress did not intend the tax exemption for PCAs to be absolute is the language of 12 U.S.C. § 2214 which provides:

> State and other laws shall apply to corporations organized pursuant to this part to the same extent such laws would apply to the organizing banks engaged in the same activity in the same jurisdiction: Provided, however, That to the extent that sections 2023, 2098, and 2134 of this title may exempt banks or associations of the Farm Credit System from taxation, such exemptions, other than with respect to franchise taxes, shall not extend to corporations organized pursuant to this part.

First, Congress provided a more specific exclusion from taxation for Farm Credit Banks and Federal land bank associations in the language of the statute addressing taxation by providing in Sections 2023 and 2098 that "the capital, reserves, and surplus thereof, and the income derived therefrom, shall be exempt" while the PCA statute (Section 2077) provides that the "notes, debentures, and other obligations issued by such associations shall be exempt." This difference in language is clearly indicative of Congress' intent that PCA's not have the same tax exemption as Farm Credit banking institutions. Second, the

language in Section 2214 is another clear indication of Congressional intent that the more specific tax exemption provided for Farm Credit banking institutions in Sections 2023, 2098, and 2134 was not intended to be provided for PCA's in Section 2077.

The legislative history of various provisions of the Farm Credit Act, as well as actual statutory language, indicate that Congress intended to waive any immunity from taxation which may be imputed to production credit associations by virtue of their status as federal instrumentalities. The legislative history of the changes in the statue reflect Congressional intent to waive total immunity from taxation for PCAs. The interpretation of the statute urged by appellees and accepted by the district court provides an interpretation of Section 2077 that is at odds with other provisions of the Farm Credit Act.

III.
SUMMARY JUDGMENT WAS NOT APPROPRIATE WHERE THE ISSUE, DOES A PRODUCTION CREDIT ASSOCIATION "STAND IN THE GOVERNMENT'S SHOES," REQUIRED A FINDING OF FACT.

The Court of Appeals review a grant or denial of summary judgment *de novo*. The question before the district court, and this court on appeal, is whether the record, when viewed in the light most favorable to the non-moving party, shows that there is no genuine issue as to any material fact and that the party moving for summary judgment is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c); see, e.g.*Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23, 106 S.Ct. 2548, 2552-53, 91 L.Ed. 265 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249-50, 106 S.Ct. 2505, 2510-11, 91 L.Ed.2d 202 (1986); *Langley v. Allstate Insurance Co.*, 995 F.2d 841 (8th.Cir.1993); *Get Away Club, Inc. v. Coleman*, 969 F.2d 664, 666 (8th Cir.

1992).

In the Response to Motion for Summary Judgment and Brief in Support, appellant specifically enumerated the genuine issues of material fact remaining that relate to whether appellees should be considered federal instrumentalities for purpose of exemption from state tax. Those issues included a factual finding as to the functions performed by the appellees, and whether those functions are governmental; the control exercised over appellees by the Farm Credit Administration; whether the stock of appellees is owned by the government or by individual investors; and whether appellees' employees are treated as federal employees. The District Court erred in granting summary judgment for the appellees based on statutory language without affording appellant an opportunity to adduce and present evidence that the function, control, ownership, and operation of production credit associations more closely resemble those of a private corporation than an entity which "stands in the Government's shoes" as required following the opinion in *United States v. New Mexico.*

CONCLUSION

The District Court erred in granting summary judgment for appellees. On appeal the Court should find that, based upon the existing statutory language and legislative history Congress intended to waive any immunity provided to production credit associations by virtue of their status as federal instrumentalities, or in the alternative, should afford appellant an opportunity to present evidence that, in their structure and function, production credit associations are more like private than governmental corporations and are thus not immune from taxation as federal instrumentalities.

Respectfully submitted,
JOHN H. THEIS
Acting Commissioner of Revenue
State of Arkansas

By:________________________

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(Certificate of Service omitted in printing)

**UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT**

STATE OF ARKANSAS APPELLANT

VS . NO. 95-1856

FARM CREDIT SERVICES OF CENTRAL ARKANSAS, PCA; FARM CREDIT SERVICES OF WESTERN ARKANSAS, PCA; EASTERN ARKANSAS PRODUCTION CREDIT ASSOCIATION; and DELTA PRODUCTION CREDIT ASSOCIATION

APPELLEES

APPEAL FROM
UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

BRIEF OF APPELLEES,

FARM CREDIT SERVICES OF CENTRAL ARKANSAS, PCA; FARM CREDIT SERVICES OF WESTERN ARKANSAS, PCA; EASTERN ARKANSAS PRODUCTION CREDIT ASSOCIATION and DELTA PRODUCTION CREDIT ASSOCIATION

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REQUEST FOR ORAL ARGUMENT

The State of Arkansas, in its Appellant Brief, waived request for oral argument. However, oral argument is necessary due to the constitutional nature of this case and the importance of the issues involved, as such, written briefs do not afford Appellees sufficient opportunity to present their argument. Therefore, Appellees, Farm Credit Services of Central Arkansas, PCA, Farm Credit Services of Western Arkansas, PCA, Eastern Arkansas Production Credit Association, and Delta Production Credit Association, hereby request a twenty minute oral argument.

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STATEMENT OF THE CASE

Appellees, four Production Credit Associations, brought suit in the United States District Court for the Eastern District of Arkansas, against the State of Arkansas seeking a declaratory judgment that Production Credit Associations are exempt from state sales and income taxation and for an injunction against the State of Arkansas for the imposition of such taxes. Appellees moved for summary judgment on the ground that there was no genuine issue of material fact relevant to the issue of whether Production Credit Associations were immune from state sales and income taxation because Production Credit Associations are statutorily declared instrumentalities of the United States, and absent express Congressional waiver, are entitled to immunity from state income and sales taxation.

The State of Arkansas responded that Congressional declaration of Production Credit Associations as federal instrumentalities was insufficient to confer tax immunity; that waiver of immunity should be implied; and that it was necessary to make a factual inquiry into the governmental nature of Production Credit Associations in order to determine whether they were Federal instrumentalities immune from state taxation. The District Court agreed with Appellees and accordingly granted their motion for summary judgment.

STATEMENT OF FACTS

On May 5, 1994, Appellees requested the Arkansas Department of Finance and Administration to refund all taxes paid on the basis that Production Credit Associations are federal instrumentalities immune from income and sales tax imposed by the State of Arkansas. Appendix at 6. On May 26, 1994, the State denied the request for refund and refused to recognize that Production Credit Associations are federal instrumentalities. Appendix at 11. On June 17, 1994, Appellees filed suit for a declaratory judgment that Production Credit Associations were

federal instrumentalities immune from state sales and income taxation and for an injunction against the State of Arkansas for imposition of such taxes. Appendix at 1. On December 22, 1994, Appellees filed Motion for Summary Judgment and Brief in Support. Appendix at 31. On January 23, 1995, the State filed a Response to Motion for Summary Judgment and Brief in support. Appendix at 66. On February 6, 1995, Appellees filed a Reply to Defendant's Response. Appendix at 78.

The District Court granted Appellees' Motion for Summary Judgment by its Order of March 6, 1995. Appendix at 87.

SUMMARY OF THE ARGUMENT

Production Credit Associations are expressly declared by statute to be "instrumentalities of the United States." 12 U.S.C.S. §§ 2071, 2077. As Federal instrumentalities, they are immune from state taxation unless Congress has waived that immunity. The statutory provision for taxation of Production Credit Associations, Section 2077, does not contain such a waiver. The analysis should end there, and accordingly, Production Credit Associations should be held exempt from state sales and income taxation.

The State of Arkansas argues (1) that the Congressional declaration that Production Credit Associations are federal instrumentalities is insufficient to confer immunity, and (2) that even though the statute does not expressly provide waiver, Congress nevertheless intended it. For the reasons -- discussed below, both arguments lack merit.

The State urges that the factual analysis set forth in United States v. New Mexico, 455 U.S. 720 (1982), controls this case. The issue in that case was the tax immunity available to private contractors doing business with the federal government. The Supreme Court engaged in a factual inquiry into the nature of the contractors to determine if they "stood in the Government's shoes." Id. at 736. Such an inquiry is neither necessary nor appropriate in this case because Congress has spoken on the issue

by expressly declaring that Production Credit Associations are Federal instrumentalities. Federal instrumentalities governmental and inherently stand in the shoes of the government.

The State also urges this Court to find implied waiver of immunity through the sparse legislative history of the statute. At the' district court level, and in its Appellant brief, the State has not shown that the statute at *issue is* ambiguous or contains any language which could be construed" as a waiver of immunity. Rather, it delves into prior acts and legislative materials in an effort to make the statute ambiguous. Even though the State's arguments are without merit and speculative at best, the State should not be allowed to make unclear a statute that clearly provides no waiver of immunity from the taxation that the State seeks to impose.

The sole issue involved in this case is a legal one: whether Production Credit Associations as Federal instrumentalities are exempt from the challenged state taxation. The State in its attempt motion for summary judgment attempted into a factual one by arguing for an Credit Associations'closeness to defeat Appellees' to change this inquiry analysis of Production the government. Because this argument was misplaced, the State did not offer any facts relevant to the legal issue, and thus, summary judgment was appropriate. Therefore, the District Court properly granted Appellees' motion for summary judgment because the State could not show the existence of any genuine issue of material fact relevant to the determination that Production Credit Associations are Federal instrumentalities exempt from state sales and income taxation.

ARGUMENT

INTRODUCTION

Appellees are Production Credit Associations and member institutions of the Farm Credit System, organized and chartered by Congress. The institutions of the Farm Credit System enjoy a unique status. They are the only governmentally chartered corporations which are denominated "federally chartered instrumentalities of the United States." Production Credit Associations are identified as Federal-~ instrumentalities in the following three sections of the Farm Credit Act of 1971 (Pub. L. 100-233, 101 Stat. 1568, 100th Cong., H.R. 3030 (Jan. 6, 1988)):

> 12 U.S.C.S. § 2071(a): "Each production credit association shall continue as a Federally chartered instrumentality of the United States."

> 12 U.S.C.S. § 2071(b)(7): "On approval of the proposed articles . . . the [production credit] association shall become as of such date a federally chartered body corporate and an instrumentality of the United States."

> 12 U.S.C.S. § 2077: "Each production credit association and its obligations are instrumentalities of the United States . . .."

Similar designations have been given to the other Farm Credit System institutions including the Farm Credit Banks, the Federal Land Banks, the Federal Land Bank Associations, Banks for Cooperatives, and the National Bank for Cooperatives. See 12 U.S.C.S. §§ 2011, 2091, 2121 (Supp. 1994); 12 U.S.C. § 2011 (1982).

Congress has specifically identified the Farm Credit System institutions as Federal instrumentalities because of the impor-

tant governmental purpose which they serve. 12 U.S.C.S. § 2001(a) (1984) states:

> It is declared to be the policy of the Congress, recognizing that a prosperous, productive agriculture is essential to a free nation and recognizing the growing need for credit in rural areas, that the farmer-owned cooperative Farm Credit System be designed to accomplish the objective of improving the income and well-being of American farmers and ranchers by furnishing sound, adequate, and constructive credit and closely related services to them, their cooperatives, and to selected farm-related businesses necessary for efficient farm operations.

The United States Supreme Court has repeatedly acknowledged the important governmental purpose served by the institutions of the Farm Credit System. In *Federal Land Bank of St. Paul v. Bismarck Lumber Co.*, 314 U.S. 95 (1941), the Court discussed the function of the Federal Land Banks and the Farm Loan Associations. The Court stated:

> The Federal land banks are constitutionally created, *Smith v. Kansas City Title & Trust Co.*, 255 U.S. 180, and respondents do not urge otherwise. Through the land banks the federal government makes possible the extension of credit on liberal terms to farm borrowers. As part of their general lending functions, the land banks are authorized to foreclose their mortgages and to purchase the real estate at the resulting sale. They are "instrumentalities of the federal government, engaged in the performance of an important governmental function." *Federal Land Bank v. Priddy*, 295 U.S. 229, 231; *Federal Land Bank v. Gaines*, 290 247, 254. The national farm loan associations, the local cooperative organizations of borrowers through which the land banks make loans to individuals, are also federal instrumentalities. *Knox National Farm Loan Assn. v. Phillips*, 300 U.S. 194, 202; *Federal Land Bank v. Gaines*, supra, 254.

314 U.S. at 102. The status of the Farm Credit System institutions as Federal instrumentalities was reconfirmed in Federal Land Bank of Wichita v. Board of County Comm'rs, 368 U.S. 146 (1961). In response to the State's argument that the Federal Land Banks were engaged in commercial or proprietary activity, the Court stated:

> Legitimate activities of governments are sometimes classified as "governmental" or "proprietary"; however, our decisions have made it clear that the Federal Government performs no "proprietary" functions. If the enabling Act is constitutional and if the instrumentality's activity is within the authority granted by the Act, a governmental function is being performed;

368 U.S. at 150-51.

In sum, the Production Credit Associations are specifically recognized by Congress as "Federal instrumentalities" performing an important governmental function. The status of the institutions of the Farm Credit System as Federal instrumentalities engaged in the performance of an important governmental function has repeatedly been recognized by the United States Supreme Court. The District Court correctly concluded that Production Credit Associations are Federal instrumentalities exempt from Arkansas taxation.

I. GRANTING PLAINITFFS' MOTION FOR SUM MARY JUDGMENT WAS PROPER WHERE THE APPELLANT FAILED TO SHOW THE EXIST-ENCE OF ANY MATERIAL FACT RELEVANT TO THE ISSUE OF PRODUCTION CREDIT ASSOCIA-TIONS' STATUS AS TAX EXEMPT FEDERAL INSTRUMENTALITIES.

The Court of Appeals reviews a grant or denial of summary judgment *de novo. Moore v. Webster,* 932 F.2d 1229 (8th Cir. 1991). The question before this Court, whether the record, when viewed in the light most favorable to the nonmoving party, shows that there is no genuine issue of material fact and that the moving party is thus entitled to summary judgment as a matter of law, (Fed. R. Civ. P. 56(c), *Celotex Corp. v. Catrett,* 477 U.S. 317 (1986)), must be answered in the affirmative.

There are no genuine issues of material fact at issue in this case. It is undisputed that Appellees are Production Credit Associations chartered and organized under the Farm Credit Act of 1971. They are Federal instrumentalities pursuant to the plain language of Sections 2071 and 2077 of Title 12 of the United States Code. The issue involved in this case, whether Production Credit Associations as Federal instrumentalities are immune from state sales and income taxation, is not determined by any factual inquiry, rather, it is a legal question, and the factors that the State urged the District Court to consider were not relevant to this issue. As such, Appellees' motion for Summary Judgment was properly granted.

II. PRODUCTION CREDIT ASSOCIATIONS ARE FEDERAL INSTRUMENTALITIES EXEMPT FROM STATE TAXATION.

Appellees' position is clear. First, Congress expressly declared Production Credit Associations to be Federal instrumentalities. Second, Federal instrumentalities are accorded immunity from state taxation under the long-standing doctrine of constitutional immunity from state taxation, as first announced in *McCulloch v. Maryland,* 17 U.S. 316 (1819). "[A] federal instrumentality is not subject to the plenary power of the States to tax..." *Federal Land Bank of Wichita v. Board of County Comm'rs.,* 368 U.S. 146 (1961). "It is a well-established doctrine that federal agencies or instrumentalities are immune from special assessments by state and local governments." *Federal Reserve Bank of St.* Louis v. Metrocentre Improvement Dist. #1 657 F.2d 183, 185 (8th Cir. 1981), *aff'd sub nom,* 455 U.S. 995 (1982). "It is familiar law that a State has no power to tax the property of the United States or any of its instrumentalities within its limits without the consent of Congress ..." *Board of Directors of Red River Levee Dist. No. 1 v. Reconstruction Finance Corp.,* 170 F.2d 430, 431 (8th Cir. 1948).

Finally, it instrumentality is well established law that a Federal immune from state taxation unless Congress expressly, clearly, and affirmatively consents to its taxation. *See Department of Employment v. U.S.,* 385 U.S. 355 (1966); *Federal Reserve Bank of St. Louis v. Metrocentre Improvement Dist. #1, supra; United States v. City of Adair,* 39 F.2d 1185 (8th Cir. 1976), *cert. denied,* 429 U.S. 121 (1977).

These three propositions form the bases of the District Court's decision and are beyond dispute.

As its basis for reversal, the State contends that Congress' declaration that a Production Credit Association is a Federal instrumentality is not sufficient to establish that it is a "government" entity. (Appellant's Brief at 14). The State urges that United States v. New Mexico, 455 U.S. 72P (1982), controls this case and requires a factual inquiry to determine if a Production Credit Association is "so closely connected to the Government that the two cannot realistically be viewed as separate

entities." (Appellant's Brief at 15).[1]

The State's reliance on *New Mexico* is clearly misplaced. In *New Mexico*, the Supreme Court addressed the issue of whether a tax imposed on the receipts of a government contractor was an unconstitutional levy on the Federal government itself; instrumentality status was not claimed, nor was it at issue. When the Federal government or an instrumentality thereof is not the taxpayer, the Court held that state tax immunity is confined to private taxpayers who actually "stand in the Government's shoes." *United States v. New Mexico*, 455 U.S., at 736 (quoting *City of Detroit v. Murray Corp.*, 355 U.S. 489, 503 (1958)).

On the issue of immunity from state taxation, the Supreme Court has specifically recognized the difference between private contractors and Federal instrumentalities. *James v. Dravo Contracting Co.*, 302 U.S. 134 (1937) (state tax on gross receipts of private contractor providing services to Federal government was upheld). "Many years ago the Court recognized and enforced the distinction between a tax laid directly upon a government contract or an instrumentality of the United States and a tax upon the property employed by an agent or contractor

[1] It is important to note that the Appellant failed to inform the Court that at issue in *New Mexico* was "a recurring problem: to what extent may a State impose taxes on contractors that conduct business with the Federal Government?" *New Mexico*, 455 U.S. at 722. In addition, the government did not claim that the contractors were Federal instrumentalities. Id. at 725. Thus, in New Mexico, the Court did not have before it the issue of the tax immunity of a statutorily-declared Federal instrumentality, and the Court's decision must be read in light of this fact. It is significant to point out that since *New Mexico* was handed down, no court has applied its analysis to determine the tax status of an entity that Congress declared to be a Federal instrumentality by statute.

in performing services for the United States." Id. at 153.[2]

The State's error is further explained in *United States v. City of Spokane*, 918 F.2d 84, 88 (9th Cir. 1990), which held the *New Mexico* analysis unnecessary with respect to the state tax immunity of a Federal instrumentality. In *City of Spokane*, at issue was the attempted taxation of lawfully conducted gambling activities of a local unit of the American National Red Cross. The Red Cross was federally chartered in 1905 and declared to be an instrumentality of the United States in *Department of Employment v. U.S.*, 385 U.S. 355 (1966).

The City relied upon *New Mexico* to argue that the Red Cross was not exempt from the Spokane gambling tax. The Ninth Circuit distinguished *New Mexico* and found the analysis of that case unnecessary.

> But the City claims that there is still another string to its bow, for some activities of agencies of the United States can be taxed. Here again, when gazing upon the authorities cited one must be purblind if one is to overlook the distinctions between those authorities and this case.
>
> Thus, in *James v. Dravo Contracting Co.*, 302 U.S. 134, 58 S.Ct. 208, 82 L.Ed. 155 (1937), a private independent corporation that had contracts with the United States complained about the taxation of its gross receipts. The Court declined to find that a tax on the private entity was a tax upon the government or its instrumentalities, even though the effect of the tax could, in theory, be felt by the government. *James*, 302 U.S. at 161, 58 S.Ct. at 221.

[2] It Should be noted that *Dravo* was cited with approval by the Supreme Court in *New Mexico* as the case which "set the doctrine [of constitutional immunity] on its modern course [differentiating between private taxpayers and governmental instrumentalities]." *Dravo*, 455 U.S. at 736.

That is not this case; the Red Cross is no mere private contractor, it is a United States instrumentality. The same analysis applies to *United States v. New Mexico*, 455 U.S. 720, 102 S.Ct. 1373, 71 L. Ed.2d 580 (1982). There, too, a tax on the receipts of private contractors was attacked; there, too, the tax was sustained. The Court indicated that the mere fact that a contractor acts as an agent of the government does not mean that it is an agency or instrumentality of the government. It does not mean that the contractor stands in the government's shoes. 455 U.S. at 735-36, 102 S.Ct. at 1383. The entities in question were not so integrated into the structure of the government that its tax immunity devolved upon them. Rather, it was realistic to view them as the private entities they were -entities "independent of the United States." 455 U.S. at 738, 102 S.Ct. at 1385. When dealing with entities of that stripe, it is necessary to be extremely careful about parsing their various activities when they claim that a tax falls directly on the United States. The same does not apply when one is dealing with an acknowledged government instrumentality such as the Red Cross. To do so in that instance would engage the courts in the unfit inquiry that *M'Culloch* warned against. 17 U.S. (4 Wheat.) at 430. Private independent contractors may be agencies because they act as agents. They are not to be confused with instrumentalities like the Red Cross which are agencies because they were created to carry out functions of the government itself and are, therefore, imbedded in the structure of the government to that extent.

City of Sookane, 918 F.2d at 87-88.

Congress expressly declared that Production Credit Associations are governmental entities. 12 U.S.C.S §§ 2071, 2077.- By that designation, they stand in the shoes of the government. "The federal government is one of delegated powers, and from

that it necessarily follows that any constitutional exercise of its delegated powers is governmental. When Congress constitutionally creates a corporation through which the federal government lawfully acts, the activities of such corporation are governmental." *Federal Land Bank of St. Paul v. Bismarck Lumber Co.*, 314 U.S. 95, 102 (1941) (refusing to impose tax on Federal Land Bank and rejecting argument that Federal Land Banks are proprietary rather than governmental).

> Legitimate activities of governments are sometimes classified as 'governmental' or 'proprietary'; however, our decisions have made it clear that the Federal Government performs no 'proprietary' functions. If the enabling Act is constitutional and if the instrumentality's activity is within the authority granted by the Act, a government function is being performed.

Federal Land Bank of Wichita v. Board of County Comm'rs., 368

U.S. 146, 150-51 (1961).

These cases show that the court's proper inquiry is not whether the activities of a Federal instrumentality are governmental or private in nature, but rather whether the entity was constitutionally created and whether its activities are within the scope of the authority granted to it by Congress. The State does not challenge the constitutionality of Production Credit Associations or assert that these Production Credit Associations exceeded the scope of their Congressional charter.

Even if the court engages in a review of the activities of Production Credit Associations, it should still uphold the District Court's decision. Appellees perform governmental functions, and this Court has so held: "Farm Credit entities are instrumentalities of the federal government, engaged in the per-

formance of an important governmental function." *Slotten v. Hoffman*, 999 F.2d 333, 335 (8th Cir. 1993) (citing *Federal Land Bank v. Priddy*, 295 U.S. 229 (1934)).[3]

The State has cited various cases from other circuits and state courts which analyze the status of entities of the Farm Credit System for purposes other than taxation. (Appellant's Brief at 12-13). This court has clearly held that because of policy considerations, the test of whether an entity is an instrumentality for purposes of taxation differs from those tests or analyses applied for other purposes. *Federal Reserve Bank of St. Louis v. Metrocentre Improvement* Dist. #1, 657 F.2d 183, 185 Fn.2 (8th Cir. 1981), aff'd sub *nom*, 455 U.S. 995 (1982). *See also, City of Spokane*, 918 F.2d at 88 (distinguishing holding for purposes of Freedom of Information Act from determination for tax purposes). Accordingly, this Court should disregard any inference that the State suggests can be drawn from such cases outside the area of taxation.

In sum, Production Credit Associations, by virtue of their instrumentality status, "stand in the shoes of the Government" and perform governmental functions. The State overlooks this in relying on the government contractor analysis of *New Mexico*. After acknowledging that Production Credit Associations are Federal instrumentalities, as expressly declared by Congress, the inquiry then turns to the second part of the immunity analysis, whether Congress has waived their immunity from state and local taxation.

[3] The Sixth Circuit recently upheld the instrumentality status of Federal Credit Unions and, in so doing, analogized their important governmental function to that of Farm Credit institutions. See *United States v. Michigan*, 851 F.2d 803, 806 (6th Cir. 1988) (holding Federal Credit Unions exempt from Michigan sales tax).

III. CONGRESS HAS NOT WAIVED THE TAX IMMUNITY OF PRODUCTION CREDIT ASSOCIATIONS.

The only statute addressing taxation of Production Credit Associations, 12 U.S.C.S. § 2077 (Supp. 1994), states as follows:

> **Each production credit association and its obligations are instrumentalities of the United States and as such any and all notes, debentures, and other obligations issued by such associations shall be exempt, both as to principal and interest, from all taxation (except surtaxes, estate, inheritance, and gift taxes) now or hereafter imposed by the United States or any State, territorial, or local taxing authority, except that interest on such obligations shall be subject to Federal income taxation in the hands of the holder.**

An-instrumentality of the United States is not subject to state taxation unless Congress expressly, clearly, and affirmatively consents to such taxation. *Department of Employment v. U.S.*, 385 U.S. 355 (1966); *Federal Reserve Bank* of St. Louis v. Metrocentre Improvement Dist. #1 657 F.2d183 (8th Cir. 1981), *aff'd sub nom*, 455 U.S. 995 (1982); *United States v. City of Adair*, 539 F.2d 1185 (8th Cir. 1976), *cert. denied*, 429 U.S. 121 (1977). Accordingly, as a matter of law, a waiver cannot be inferred from Congressional silence.

> **It is true that the silence of Congress, when it has authority to speak, may sometimes give rise to an implication as to the Congressional purpose. The nature and extent of that implsication depend upon the nature of the Congressional power and the effect of its exercise. But there is little scope for the application of that doctrine to the tax immunity of**

> governmental instrumentalities. The constitutional immunity of either government from taxation by the other, where Congress is silent, has its source in an implied restriction upon the powers of the taxing government.

Graves v. New York ex rel O'Keefe, 306 U.S. 466, 479-80 (1938). *See also M.G. West Co. v. Johnson*, 66 P.2d 1211, 1213 (Ca. Ct. App. 1937) (the doctrine of constitutional immunity announced in *McCulloch* applies when the statute is silent on the issue of taxation).

Without an express waiver of immunity from state income and sales taxation in another statute (and the State cites us to none), Appellees are exempt from such taxes due to their status as Federal instrumentalities. In its brief, the State fails to address this absence of express waiver and attempts to avoid the issue by delving into Congressional intent.

The State's argument is based on the premise that Congress intended to waive Production Credit Associations' immunity through 1985 legislation amending the Farm Credit Act. To accept this premise, one must first accept that an implied waiver of immunity from taxation is sufficient to make a Federal instrumentality subject to taxation. To allow the State to prevail on this theory would require this Court to ignore the long-standing and time-tested doctrine of constitutional immunity, as first announced in *McCulloch v. Maryland*, which permits the State to impose a tax on an instrumentality of the United States only when express, clear, and affirmative legislation allows it to do so.

Moreover, the State's resort to legislative history is inappropriate because the statute at issue, 12 U.S.C.S. § 2077, is not ambiguous. Since it is unambiguous, legislative history is unnecessary because the court must give the unambiguous language its plain meaning. *See. e.g., Fairport. Painesville & E. R.R. Co. v. Meredith*, 292 U.S. 589, 594 (1934); *Wilbur v. U.S.*,

284 U.S. 231, 237 (1931).

The State correctly states that statutory language is frequently capable of more than one interpretation. (Appellant's Brief at 9). However, the State fails to suggest how the statute in question is ambiguous and thus susceptible to more than one interpretation. To create ambiguity, the State attempts to contrast the pre-amendment statute with the post-amendment statute. Because Section 2077 is not ambiguous, prior acts may not be referred to in order to create an ambiguity where none exists on the face of the statute. *See. e.g., Hamilton v. Rathbone*, 175 U.S. 414 (1899); *H. Wetter Mfa. Co. v. U.S.*, 458 F.2d 1033, 1035 (6th Cir. 1972) (where the statute is unambiguous, the court should not depart from its plain meaning to bring about auniformity that is claimed Congress intended but failed to expressly provide).

Even if the Court found the language of 12 U.S.C.S §2077 to be ambiguous, the State's argument still fails since any waiver of immunity requires express, clear, and affirmative legislation.

Furthermore, contrasting Section 2077 before and after the 1985 amendment does not provide a clear indication of Congress' intent. The Farm Credit Amendments Act of 1985, Pub. L. 99-205, 99 Stat. 1678, 1705 (1985) deleted the last two sentences of Section 2077. Under these sentences, immunity was waived upon retirement of all Production Credit Association capital held by the Governor of the Farm Credit Administration. The legislative history is silent as to the effect this deletion would have on the tax status of Production Credit Associations. The State's position is that Congress intended to withdraw a benefit historically afforded Production Credit Associations and other System institutions. Given the financial dis-

tress the System was experiencing, this position is anomalous.[4] In any event, this inquiry into congressional ,intent is precisely the analysis the Supreme Court deemed unnecessary in *Graves v. New York ex ref. O'Keefe, supra.*

The State offers, as evidence of congressional intent of waiver of tax exemption, a colloquy between members of the House of Representatives that transpired *three years after* the amendment deleting the two sentences. 134 Cong. Rec. H. 462 (daily ed. February 23, 1988) (discussion between Reps. De La Garza and Smith). (Appellant's Brief at 20-21). As such, the colloquy is not part of any legislative history. In fact, post-enactment statements of legislators regarding the meaning or intent of an act merely represent the understanding of individual legislators. *See. e.g., Quern v. Mandley*, 436 U.S. 725 (1978) (holding that post-passage remarks of a Senator in the Congressional Record were of slight probative value because they represented post-hoc observation by a single member of Congress); *Los Angeles, Dep't of Water & Power v. Manhart*, 435 U.S. 702 (1978) (refusing to acknowledge Senators' remarks in a colloquy which occurred one year after enactment of the statute and holding that the Senators' remarks could not be the sole guide to interpreting the previously enacted statute, nor could they change the effect of the plain language of the statute itself); *Regional Rail Reorganization Act Cases*, 419 U.S. 102 (1974)

[4] Congress passed the 1985 legislation in response to an agricultural depression that had placed the System's financial viability in jeopardy. H.R. No. 99-425, 99th Cong., 1st Sess. 5-11 (1985). In fact, Congress ultimately authorized up to $4 billion in financial assistance to the Farm Credit System in order to preserve its ability to serve as a major source of agricultural credit. Agricultural Credit Act of 1987, Pub. L. 100-233, 101 Stat. 1568, 100 Cong., H.R. 3030 (Jan. 6, 1987), 12 U.S.C.S. §2278b-6 (Supp. 1994) At that time, this constituted the lartest Congressional assistance package ever assembled.

(holding that post-passage remarks of legislators made after statute enacted represented only personal views of those legislators and thus not relevant to meaning of the act); and *National Woodworks Mfg Ass'n v. NLRB*, 386 U.S. 612 (1967) (holding that post enactment statements by legislators inserted into the Congressional Record represented the personal views of those legislators and thus were afforded no probative value).

Even if this discussion could be considered legislative history, it is ambiguous at best. The discussion related to state taxation of real and personal property of Production Credit Associations.[5] The exchange is silent as to state taxes of the types at issue here.

Section 2077 unambiguously states that Production Credit Associations are "instrumentalities of the United States"; it contains no express waiver of immunity from state sales and income taxation; nor does the Act as a whole expressly provide for waiver of Production Credit Associations' tax immunity. Thus, resort to legislative history is unnecessary and it is inappropriate for the State to refer to prior acts for the sole purpose of creating an ambiguity in an otherwise unambiguous statute.

Moreover, if Congress had intended the 1985 amendment to waive Production Credit Associations tax immunity it could have done so expressly. An excellent example of how express waiver of immunity is accomplished is cited by the State. In its brief, the State cites 12 U.S.C.S. § 2214 (Supp. 1994), which clearly provides that the tax exemption granted to the Farm Credit Banks, Federal Land Bank Associations, and Banks for Cooperatives do not extend to service corporations created by these banks:

[5] It should be noted that the *McCulloch* constitutional immunity doctrine does not extend to property taxes. Accordingly, Farm Credit institutions, including Production Credit Associations, have always been subject to property taxes. *See. e.g.*, 12 U.S.C.S. §§ 2023, 2077, 2098 (Supp. 1994).

> State and other laws shall apply to corporations organized pursuant to this part to the same extent such laws would apply to the organizing banks engaged in the same activity in the same jurisdiction: Provided, however, That to the extent that [sections 2023 (Farm Credit Banks), 2098 (Federal Land Bank Associations), and 2134 (Banks for Cooperatives)] may exempt banks or associations of the Farm Credit System from taxation, such exemptions, other than with respect -to franchise taxes, shall not extend to corporations organized pursuant to this part.

These service corporations become federally chartered instrumentalities upon the approval of their Articles by the Farm Credit Administration. 12 U.S.C.S. § 2211 (Supp. 1994). Thus, service corporations formed pursuant to Section 2214 are Federal instrumentalities, which would be exempt from state taxation but for Section 2214, which provides for an express waiver of their tax immunity, other than with respect to franchise taxes.

Instead of viewing this statute as the way in which Congress waives tax immunity of a Federal instrumentality, cites this statute in support of its argument that the State Congress intended "that the more specific tax exemption provided for Farm Credit banking institutions in Sections 2023, 2098, and 2134 was not intended to be provided for PCA's in Section 2077." (Appellant's Brief at 22). The State's argument has a fatal flaw. Section 2214 does not apply to Production Credit Associations because Production Credit Associations are not eligible to form service corporations. 12 U.S.C.S. § 2211 (Supp. 1994). Thus, the omission of Production Credit Associations from Section 2214 is perfectly natural and to be expected[6]

As for the difference in the language of the taxation provisions for Federal Land Bank Associations and Farm Credit Banks and Production Credit Associations, it can be said that the-more specific sections for Federal Land Bank Associations and Farm Credit Banks provide an express immunity from taxation while the Production Credit Association section silent. Again, a waiver cannot be inferred from silence. 12 U.S.C.S. § 2077, Production Credit Associations declared to be Federal instrumentalities. The State failed to prove that Congress expressly, clearly, affirmatively waived their exemption. Absent waiver, State cannot constitutionally impose sales and income upon Production Credit Associations.

[6] In addition, the taxation provision for Banks for Cooperatives, Section 2134, contains language that is identical to the taxation provision for Production Credit Associations, Section 2077. As such, the State is simply incorrect in asserting that the omission of a reference to Section 2077 in Section 2214 shows Congressional intent that Production Credit Associations have a different tax exemption than that provided other Farm Credit banking institutions. There is simply no way that Congress intended for Banks for Cooperatives (Section 2134) to have a more specific exemption than Production Credit Associations (Section 2077) because the language of these sections is identical.

CONCLUSION

Appellees' motion for summary judgment was properly granted. On appeal, the Court should affirm the District Court's finding that Production Credit Associations are Federal instrumentalities, that there is no express, clear, and affirmative consent to Appellant's attempted taxation, and that accordingly, Appellees are exempt from state income and sales taxation.

Respectfully Submitted,

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Dated: June 14, 1995

(Certificate of Service omitted in printing)

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT
No. 95-1856

Farm Credit Services of Central Arkansas, PCA; Farm Credit Services of Western Arkansas, PCA; Eastern Arkansas Production Credit Association; and Delta Production Credit Association,

Appellees

v.

State of Arkansas

Appeal from the United States District Court for the Eastern District of Arkansas.

Submitted: November 13, 1995

Filed: February 23, 1996

Before McMILLIAN and LOKEN, Circuit Judges and DUPLANTIER, * Senior District Judge

DUPLANTIER, Senior District Judge:

Appellees, four Production Credit Associations (PCAs), brought suit in the United States District Court for the Eastern District of Arkansas against the State of Arkansas, seeking a declaratory judgment that they are exempt from state sales and income taxation and for an injunction prohibiting the state from imposing such taxes. The PCAs moved for summary judgment

*The HONORABLE ADRIAN G. DUPLANTIER, Senior United States District fudge for the Eastern District of Louisiana, sitting by designation.

on the ground that there was no genuine issue of material fact with respect to the issue of whether they were immune from state sales and income taxation because PCAs are statutorily declared instrumentalities of the United States and, absent express Congressional waiver, are entitled to immunity from such state taxation.

The state responded that Congressional declaration of PCAs as federal instrumentalities was insufficient to confer tax immunity and that waiver of immunity should be implied. The state further argued that it was necessary to make a "'actual inquiry into the governmental nature of PCAs in order to determine whether they are federal instrumentalities immune from state taxation. The District Court agreed with the PCAs and granted their motion for summary judgment.

We review the district court's grant of summary judgment de novo, and apply the same standard as applied by the district court. *Langley v. Allstate Ins. Co.*, 995 F.2d 841, 844 (8th Cir. 1993). Summary Judgment is appropriate if the record, when viewed in the light most favorable to the non-moving party, shows that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c); *see.* e g, *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23, 106 S.Ct. 2548, 2552-2553, 91 L.Ed.2d 265 (1986); *Anderson v. Liberty Lobby Inc.*, 477 U.S. 242, 249-50, 106 S.Ct. 2505, 2510-11, 91 L.Ed.2d 202 (1986); *Langley*, 995 F.2d at 844.

I. PCAs: Federal Instrumentalities Immune from State Taxation Absent Congressional Waiver

Production credit associations are expressly termed federal "instrumentalities" in relevant statutes'[1] and case law[2]. Arkansas concedes that PCAs are federal instrumentalities, but contends obligations issued by such associations shall be exempt, both as to principal and interest, from all taxation (except surtaxes, estate, inheritance, and gift taxes) now or hereafter imposed by the United States or any State, territorial, or local taxing authority, except that interest on such obligations shall be subject to Federal income taxation in the hands of the holder.

Arkansas relies upon *United States v. New Mexico* to support its contention that federal instrumentalities like PCAs do not implicitly merit federal immunity from state taxation. Arkansas contends that *New Mexico* dictates that federal instrumentalities like PCAs are immune from state taxation only if, like government contractors, they are so closely connected to

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[1]The statute regarding taxation of production credit associations expressly designates them "instrumentalities" of the United States. In full, 12 U.S.C. § 2077 states:

> Each production credit association and its obligations are instrumentalities of the United States and as such any and all notes, debentures, and other that PCAs resemble private corporations, and that the structure and objectives of the PCAs within the farm credit system indicate that their connection to the federal government is not so close as to confer upon them immunity from state taxation.

[2] "The PCA is an instrumentality of the United States. 12 U.S.C. § 2091 (1982)." *Rohweder v. Aberdeen Prod. Credit Assoc.*, 765 F2d 109, 113 (8th Cir. 1985); *see Schlake v. Beatrice Prod. Credit Assoc.*, 596 F. 2d 278, 281 (8th Cir. 1979).

the Government that they "stand in the Government's shoes."[3] Arkansas thus argues that the district court's grant of summary judgment was erroneous; Arkansas should have the opportunity to present factual evidence concerning the function, control, ownership, and operation of the PCAs. We disagree.

Beginning with *M'Culloch v. State of Maryland*, 4 Wheat. 316 (1819), the Supreme Court has repeatedly[4] held that because of the Supremacy Clause of the United States Constitution, states have no power to tax federally created instrumentalities absent Congressional authorization. "[T]he states have no power, by taxation or otherwise, to retard, impede, burden, or in any manner control, the operations of the constitutional laws enacted by congress to carry into execution the powers vested in the general government. This is, we think, the unavoidable consequence of that supremacy which the constitution has declared." *Id.* at 436.

The proprietary functions and other attributes of the PCAs have no bearing on their status as federal instrumentalities immune from state taxation. The Supreme Court has made it clear that "the Federal Government performs no 'proprietary' functions. If the enabling Act is constitutional and if the instrumentality's activity is within the authority granted by the Act, a governmental function is being performed." *Federal Land Bank of Wichita v. Bd. of County Comm'rs*, 368 U.S. 146, 150-51, 82 S.Ct 282, 286, 7 L.Ed.2d 199 (1961) (citing *Federal Land Bank v. Bismarck Lumber Co.*, 314 U.S. 9S, 102, 62

[3] *See infra* note 5.

[4] *See. e.g., United States v. .State Tax Comm'n of Miss.*, 421 U.S. 599, 605, 95 S.Ct. 1872, 1876, 44 L.Ed.2d 404 (1975); *First Agric. Nat. Bank v. State Tax Comm'n*, 392 U.S. 339, 340, 88 S.Ct. 2173, 2174, 20 L.Ed.2d 1138 (1968), *Department of Employment v. United States*, 385 U.S. 355, 360, 87 S.Ct. 464, 467, 17 L.Ed.2d 414 (1966); *see also United States v. City of Columbia*, 914 F.2d 151, 153 (8th Cir. 1990).

S.Ct. 1, 5, 86 L.Ed. 65 (1941)). Arkansas makes no claim that the PCAs or their activities are unconstitutional. Thus, no further review or factual development of the PCAs' functions or objectives is necessary.

Arkansas incorrectly contends that the reasoning of *United States v. New Mexico* applies to PCAs. 455 U.S. 720, 102 S.Ct. 1373, 71 L.Ed.2d 580 (1982). In *New Mexico*, the Supreme Court clarified the test for determining which government contractors merit immunity from state taxation[5]. The Court granted certiorari solely "to consider the seemingly intractable problems posed by state taxation of federal contractors." 455 U.S. at 730. The Court thus considered and discussed the objectives, functions, and ownership of the contractors in light of the clarified standard after concluding that the contractors were not "instrumentalities" of the United States[6]. *Id.* at 739-40. By contrast, PCAs are federal instrumentalities, clearly designated as such, by federal statutes. Thus *New Mexico* is readily distinguishable as applicable to tax immunity cases involving federal contractors, not Congressionally created federal instrumen-

[5] For such government contractors, "tax immunity is appropriate in only one circumstance: when the levy falls on the United States itself, or on an agency or instrumentality so closely connected to the Government that the two cannot realistically be viewed as separate entities, at least insofar as the activity being taxed is concerned.. 455 U.S. at 735. In other words, "to resist the State's taxing power, a private taxpayer must actually 'stand in the Government's shoes.'. *Id.* at 736. (citing *City of Detroit v. Murray Corp.*, 355 U.S. 489, 503, 78 S.Ct. 458, 491, 2 L.Ed.2d 441 (1958)).

[6] The Court also noted that the United States, the party seek ing the declaratory judgment that certain advanced funding to the contractors was not taxable by New Mexico,did not claim that the contractors were federal instrumentalities. *Id.* at 725.

talities like PCAs'[7]. Indeed, in *New Mexico*, the Court reaffirmed the rule that federal instrumentalities are exempt from state taxation[8].

II. Congress Made No Express Waiver of the PCAs' Tax Immunity.

In order to subject federal instrumentalities such as PCAs to state taxation, Congress must enact a clear waiver of their exemption. *Department of Employment v. United States*, 385 U.S. 355, 360, 87 S.Ct. 464, 467, 17 L.Ed.2d 414 (1966). "[W]here there is federal immunity from taxation, Congress must express a clear, express, and affirmative desire to waive that exemption." *Federal Reserve Bank of St. Louis v. Metrocentre Improvement Dist. #1*, 657 F.2d 183, 186 (8th Cir. 1981)) (citing *United .States v. City of Adair*, 539 F.2d 1185, 1189 (8th Cir. 1976), *cert. denied*, 429 U.S. 1121, 97 S.Ct. 1157, 51 L.Ed.

[7] The Ninth Circuit has also distinguished *New Mexico* for similar reasons, noting that the case applied to "mere private contractor[s]," and not to a "United States instrumentality" like the American National Red Cross. *United States v. City of Spokane*, 918 F.2d 84, 87 (9th Cir. 1990), *cert. denied*, 501 U.S. 1250, 111 S.Ct. 2888, 115 L.Ed.2d 1053 (1991).

[8] The Court began its explanation of federal tax immunity with the "one constant" in the discussion: "a State may not, consistent with the Supremacy Clause, U.S. Const., Art. VI, cl. 2, lay a tax "directly upon the United States." *Id.* at 733 (citing *Mayo v. United States*, 319 U.S. 441, 447, 63 S.Ct. 1137, 1140, 87 L.Ed. 1504 (1943)). The Court also quoted an earlier case which stated that if government contractors became "so incorporated into the government structure as to become instrumentalities of the United States," they would "thus enjoy governmental immunity." *Id.* at 736 (quoting *United States v. Boyd*, 378 U.S. 39, 48, 84 S.Ct. 1518, 1524, 12 L.Ed.2d 713 (1964)).

571 (1977)), *aff'd*, 455 U.S. 995, 102 S.Ct. 1625, 71 L.Ed.2d 857 (1982). The only congressional enactment which currently deals with state taxation of PCAs states that all notes, debentures, and other obligations of the associations are exempt from state taxes. 12 U.S.C. § 2077 (quoted in full, supra). Prior versions of statutes dealing with taxation of PCAs expressly exempted their "capital, reserves, surplus, and other funds, and their income." Farm Credit Act of 1971, Pub.L. No. 92-181, § 2.17, 85 Stat. 583, 602 (1971); Farm Credit Act of 1933, Pub. L. No. 73-75, § 63, 48 Stat. 257, 267 (1933). Arkansas contends that because the current statutory provision no longer contains such additional express waiver language, Congress has waived the PCAs' exemption. The converse can be argued with greater force: the current version of § 2077 acknowledges that because of the Supremacy Clause express exemption of the PCAs from state taxation in the earlier statutes constituted unnecessary surplus language. Where Congress is silent, the tax immunity of federal instrumentalities from state taxation is implied. See *Graves v. New York ex ref. O'Keefe*, 306 U.S. 466, 480, 59 S.Ct. 595, 598, 83 L.Ed. 927 (1939).

There is no provision in any statute, including 12 U.S.C. § 2077, which indicates an intent on the part of Congress to waive the PCAs' tax immunity as federal instrumentalities. Therefore, the PCA's, as instrumentalities of the United States, are immune to state taxation, and we affirm the district court's judgment to that effect.

LOKEN, Circuit Judge, dissenting.

I respectfully dissent. It is well-established that States may not tax agencies and instrumentalities of the United States absent Congress's consent. This principle was first articulated in *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819), when the Court invalidated a discriminatory tax imposed on the Second Bank of the United States. Congress had not addressed the question in the statute, but the Bank's intergovernmental tax

immunity was implied from the Supremacy Clause of the Constitution. *Id.* at 433.

In this century, the limit of this implied immunity has evoked sharp debate among Supreme Court Justices. *See. e.g., First Agric. Nat'l Bank v. State Tax Comm'n,* 392 U.S. 339 (1968); *Graves v. New York ex ref. O'Keefe,* 306 U.S. 466 (1939). But all have agreed on one principle -- it is for Congress to determine (i) which Federal instrumentalities should enjoy Immunity from state and local taxation, *and* (ii) the extent of that immunity. As the Court said in i, 355 U.S. 466, 474 (1958):

> Wise and flexible adjustment of intergovernmental tax immunity calls for political and economic considerations of the greatest difficulty and delicacy. Such complex problems are ones which Congress is best qualified to resolve.

In no area has the Court more consistently deferred to Congress than in the many cases dealing with state and local taxation of banks and other lending institutions chartered or established under Federal law. ,*See First Agric. Nat'l Bank,* 392 U.S. at 341- 46; *Federal Land Bank v. Board of County Comm'rs,* 368 U.S. 146 (1961); *Federal Land Bank v. Bismarck Lumber Co.,* 314 U.S. 95 (1941); *Pittman v. Home Owners' Loan Corp.,* 308 U.S. 21 (1939). Some of these cases referred to the doctrine of implied constitutional immunity, but all were decided on the basis of careful statutory analysis. In my view, it is that principle of deference to the legislature that should guide us, not this court's potentially mischievous dictum in prior cases to the effect that "Congress must express a clear, express, and affirmative desire to waive" the implied constitutional immunity, supra p.5. With that essential preamble, I turn to the intricacies of the statutes here at issue.

The Farm Credit System is a nationwide network of borrower-owned cooperative lending institutions intended to serve the unique credit needs of the agricultural sector. *See* H.R.

Rep. No. 425, 99th Cong., Ist Sess. 5 (1985), *reprinted in* 1985 U.S.C.C.A.N. 2587, 2591. The System began in 1916, when the Federal Farm Loan Act authorized the creation of twelve regional Federal Land Banks ("FLBs"). Pub. L. No. 64-158, § 4, 39 Stat. 360, 362 (1916). FLBs were to be partially owned and funded by the Federal government. Both the banks themselves, and their debt obligations, were given a broad statutory exemption from state and local taxes, except real property taxes:

> [E]very Federal land bank . . . including the capital and reserve or surplus therein and the income derived therefrom, shall be exempt from Federal, State, municipal, and local taxation, except taxes upon real estate held, purchased, or taken by said bank .... [F]arm loan bonds issued under the provisions of this Act shall be deemed and held to be instrumentalities of the Government of the United States, and as such they and the income derived therefrom shall be exempt from Federal, State, municipal, and local taxation.... Nothing herein shall be construed to exempt the real property of Federal . . . land banks . . . from either State, county, or municipal taxes, to the same extent, according to its value, as other real property is taxed.

Id. § 26, 39 Stat. at 380.

FLBs were only authorized to make agricultural loans secured by first mortgages on farm lands. In 1923, Congress created the Federal Intermediate Credit Banks ("FICBs") to make other types of farm loans. FICBs received the same broad statutory tax exemption as FLBs. Pub. L. No. 67-503, § 210, 42 Stat. 1454, 1459 (1923). In 1987, Congress merged the FLBs and the FICBs into Farm Credit Banks. With minor changes in statutory language, Farm Credit Banks today enjoy the same statutory tax exemption first granted FLBs in 1916. *See* 12

U.S.C. §2023

This case involves Production Credit Associations ("PCAs"), first created by Congress in the Farm Credit Act of 1933 to provide short-to-intermediate-term loans directly to farmers and ranchers. See Pub. L. No. 73-98, § 20, 48 Stat. 257, 259-60 (1933). PCAs were initially capitalized and owned entirely by the Federal government, but Congress hoped ("expected" might be too strong a word given Depression-era economic conditions) that PCA excess earnings would be used to retire the government's stock, resulting in "local institutions in which farmers are participants and owners and through which necessary credit may be provided on a safe business basis and at reasonable cost." S. Rep. No. 124, 73d Cong., 1st Sess. 2 (1933). Congress reflected that hope in the express but limited tax exemption granted PCAs in the 1933 Act:

> Production Credit Associations . . . and their obligations, shall be deemed to be instrumentalities of the United States, and as such, any and all notes, debentures, bonds, and other such obligations issued by [PCAs] shall be exempt both as to principal and interest from all taxation . . . imposed by the United States or by any State, Territorial, or local taxing authority. [PCAs], their property, their franchises, capital, reserves, surplus, and other funds, and their income, shall be exempt from all taxation now or hereafter imposed by the United States or by any State, Territorial, or local taxing authority; except that any real property and any tangible personal property . . . shall be subject to Federal, State, Territorial, and local taxation to the same extent as other similar property is taxed. *The exemption provided herein shall not apply with respect to any [PCA] or its property or income after the stock held in it by the [United States has been retired ....*

Pub. L. No. 73-98, § 63, 48 Stat. at 267 (emphasis added). This is a very different exemption than Congress granted the earlier farm credit institutions, FLBs and FICBs. Congress did not explain why it linked the PCAs tax exemption to government ownership, and why it did not also impose that limitation on FLBs and FICBs.[1]

By the early 1960s, many PCAs were privately owned, and States began assessing various taxes, relying upon the last sentence of the above-quoted statute. Some PCAs resisted, claiming implied immunity as Federal instrumentalities. To my knowledge, every state appellate court to consider the question rejected the PCAs position, concluding that the Federal statute was express consent for state taxation of privately-owned PCAs. *See, e.g., Baker PVA v. StateTax Comm'n*, 421 P.2d 984 (Or. 1966); *Woodland PCA v. Franchise Tax Bd.*, 37 Cal. Rptr. 231 (Diet. Ct. App. 1964); *Montana Livestock PCA v. State*, 393 P.2d 50 (Mont. 1964); *Columbus PCA v. Bowers*, 180 N.E.2d 1 (Ohio), *cert. denied*, 371 U.S. 826 (1962).

By 1968 all PCAs were owned entirely by their borrower-members. *See* H.R. Rep. No. 593, 92d Cong., Ist Sess. (1971), *reprinted in* 1971 U.S.C.C.A.N. 2091, 2098. When Congress substantially rewrote these statutes in the Farm Credit Act of 1971, it left unchanged the differing exemptions granted to various System lenders. *See* Pub. L. No. 92-181, §§ 1.21,

[1] The other differences in wording between the exemptions granted to FLBs and PCAs may simply reflect an evolution in drafting. The PCA form of exemption, without the critical last sentence dealing with retirement of the government's stock, is also found in the 1933 statute which created the government-owned Home Owners Loan Corporation. See Pub.. L. 73-43, § 4(c), 48 Stat. 128, 130 (1933).

2.8, 2.17, 3.13, 85 Stat. 583, 590, 597, 602, 608-09 (1971); H.R. Rep. No. 593, 1971 U.:S.C.C.A.N. at 2107-13.[2] I suspect that PCAs operating under the 1971 Act routinely paid state and local taxes in the many States with statutes expressly taxing PCAs to the extent permitted by Federal law,[3] but the record in this case is regrettably silent on the point.

Congress again overhauled the farm credit statutes in 1985, responding to a crisis in the agricultural sector that threatened to bankrupt the System. *See generally Colorado Springs PCA v. Farm Credit Admin.*, 967 F.2d 648, 650-52 (D.C. Cir. 1992). Congress made the Farm Credit Administration a more independent regulator, led by a three-member Board instead of a Governor. To conform the statute to this new agency configuration, prior references to the Governor needed to be deleted, including one that had been added to the last sentence of the PCAs' tax exemption provision, § 2.17 of the 1971 Act. However, rather than simply delete this reference to the Governor, Congress deleted the last two sentences of § 2.17. *See* Pub. L. No. 99-205, § 205(e)(16), 99 Stat. 1678, 1705 (1985). What remained, with minor subsequent changes,[4] was the statutory tax exemption for PCA obligations quoted in footnote I of the court's opinion, now codified at 12 U.S.C. § 2077.

This 1985 amendment deleted the express exemption that had been granted to a PCA and its income for so long as the

[2] Of the other System lending institutions, Federal Land Bank Associations currently have the same exemption as Farm Credit Banks, 12 U.S.C. § 2098, while Banks for Cooperatives, first created in 1933 along with the PCAs, continue to have the same limited exemption as PCAs, 12 U.S.C. § 2134.

[3] *See. e.g.*, Ala. Code § 40-16-2; Ind. Code § 6-5-12; N.Y. City Inc. Bus. Tax § 31; N.C. Gen. Stat. § 105-102.1; S.D. Cod. Laws § 10-43-2.1; Tenn. Code Ann. §§ 56-4-401 - 03.

[4] This section was reenacted in the Agricultural Credit Act of 1987, Pub. L. No. 100-233, § 401, 101 Stat. 1568, 1633 (1987).

PCA was Government-owned. The relevant Committee Report described this as merely a technical change. *See* H.R. Rep. No. 425 at 28-29, 1985 U.S.C.C.A.N. at 2615. Although more than the reference to the Governor was deleted, that is a logical explanation since there were no publicly-owned PCAs in 1985 eligible to enjoy the L. No. 100 deleted exemption. But this court has now construed a seemingly innocuous technical amendment as instead conferring an implied grant of blanket immunity from state and local taxation. In other words, the court construes the repeal of a limited express exemption, for which no PCA remained eligible, as the grant of a far broader implied exemption. Indeed, depending upon how one applies opaque dictum in the last paragraph of *McCulloch v. Maryland*, 17 U.S. at 436, the effect of this decision may be to exempt PCAs from state and local real property taxes, an exemption broader than *any* Farm Credit institution has enjoyed in the eighty-year history of the System[5]

If normal principles of statutory construction are applied, it is obvious to me that the technical change intended by the 1985 amendments should not be construed as having the extraordinary substantive effect urged by the Appellee PCAs. Because

[5] The court creates this uncertainty despite a 1988 colloquy between a Member of the House of Representatives and the Member who had been Chairman of the House Committee on Agriculture in 1985:

> MRS. SMITH OF NEBRASKA. Is it your understanding that although local governments are not given specific authority to levy property taxes on property owned by [PCAs], they are not prevented from doing so?
>
> MR. DE LA GARZA. Mr. Speaker, I would inform the gentlewoman from Nebraska that that is the advice of our legal counsel and certainly consistent with my understanding of the [1985] conference.

PCAs had no exemption from state and local taxation before the 1985 amendment (other than the exemption for their obligations), they should have no exemption under the statute as amended, 12 U.S.C. § 2077. But this court concludes otherwise, adhering -- in my view blindly -- to "no express waiver" dicta in earlier cases that discussed the implied constitutional immunity. This decision is illogical, and it is contrary to the overriding rule, grounded in constitutional and statutory principles, that defining the extent of federal instrumentality tax immunity is a quintessentially legislative task. Accordingly, I dissent.

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134 Cong. Rec. H 462 (daily ed. Feb. 23, 1988). Although postenactment views of individual legislators are not usually reliable indicators of legislative intent, the House in 1988 was considering whether a further technical amendment was needed to clarify that PCAs, like all other Farm Credit System banks, are subject to real property taxation. So this colloquy is quite persuasive support for my interpretation of the 1985 amendment.

CERTIORARI GRANTED

95-1918 ARKANSAS V. FARM CREDIT., ET AL.

The petition for a writ of certiorari is granted. In addition to the questions presented by the petition, the parties are requested to brief and argue the following question: "Should the case have been dismissed by the district court for lack of subject matter jurisdiction, in light of the Tax Injunction Act, 28 U.S.C. Section 1341?" The brief of petitioner is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Friday, February 28, 1997. The brief of respondents is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Friday, March 28, 1997. A reply brief, if any, may be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Wednesday, April 9, 1997. Rule 29.2 does not apply.